(16,216.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 143.

WILLIAM W. CONDE AND JOHN C. STREETER, PLAINTIFFS IN ERROR,

vs.

ANSON E. YORK AND WALLACE W. STARKWEATHER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a STATE OF NEW YORK, }
Jefferson County. }

CLERK'S OFFICE.

I, Frank D. Pierce, clerk of the county of Jefferson and of all the courts of record in and for the said county and of the supreme court in and for the fourth judicial department in the county aforesaid, the same being a court of record, do hereby certify and return that the following are true and correct copies of the record, remittitur of court of appeals, judgment-roll, opinions of the court, writ of error and allowance thereof, citation and proof of service thereof, and of all the records and proceedings in the action of Anson E. York & William W. Starkweather against William W. Conde & John C. Streeter on file in said clerk's office, and that I have compared the same with the originals thereof on file as aforesaid, and that the same are true and correct transcripts of said originals and of the whole thereof.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said county and court, at Watertown, N. Y., this 28th day of January, 1896.

[Seal Jefferson County.]

FRANK D. PIERCE, *Clerk.*

b UNITED STATES OF AMERICA:

The President of the United States to the honorable justices of the supreme court of the State of New York in the fourth judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you or some of you, on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to you or some of you the final decree or judgment of said court to be enforced in the suit between Anson E. York and Wallace W. Starkweather, plaintiffs, and William W. Conde and John C. Streeter, defendants, wherein the said William W. Conde and John C. Streeter specially set up and claimed a title, right, privilege, and immunity under and by virtue of a statute of the United States, viz., that the said William W. Conde and John C. Streeter were entitled under and by virtue of section 3477 of the Revised Statutes of the United States to take, hold, and retain moneys in their hands amounting to upwards of twenty-five hundred dollars ($2,500) by reason that a pretended assignment thereof for a claim against the United States made by Witherby & Gaffney to Anson E. York and Wallace W. Starkweather was void by reason of the provisions of section 3477 of the Revised Statutes U. S. and by reason that the money claimed and property claimed to have been assigned to the said York & Starkweather by Witherby & Gaffney was at the time of the pretended assignment a claim against the United States which had not then

been allowed or the amount due thereon ascertained or the warrant issued for the payment thereof, and that the said pretended assignment did not recite the warrant for payment
c issued by the United States and is not acknowledged by the person making the same before an officer having authority to take acknowledgements of deeds and is not certified by such officer, and the decision was against the title, right, privilege, and immunity so specially set up and claimed, and that as between the said Anson E. York & Wallace W. Starkweather, claimants of the said fund, under and by virtue of an assignment from Witherby & Gaffney, who owned the same, as a part of the claim against the United States, and the said William W. Conde & John C. Streeter, who claimed to own the same by reason of the actual transfer and assignment thereof to them from the said Witherby & Gaffney after the allowance and payment thereof by the United States, the said William W. Conde and John C. Streeter could not by reason of the provisions of section 3477, U. S. R. S., successfully set up or claim any title, right, privilege, or immunity in relation to the said fund as against the said Anson E. York and Wallace W. Starkweather, it being claimed that a manifest error hath happened, to the great damage of the said William W. Conde and John C. Streeter, as is said and as appears by their complaint, we, being willing that said error should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be thereby given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 24th day of February next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause what further to be done
d therein to correct the error that *all* right and according to the law and custom of the United States ought be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of January, in the year of our Lord 1896, and of the Independence of the United States the 120th.

[L. S.] W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States for the Northern District of New York, in the Second Circuit.

ELON R. BROWN,
Attorney for Plaintiffs in Error, Watertown, N. Y.

The foregoing is a copy of a writ of error granted in the above-entitled action and filed in Jefferson county clerk's office this 27th day of January, 1896.

Yours, &c., ELON R. BROWN,
Attorney for Plaintiffs in Error, Watertown, N. Y.

Allowed.
CHAS. ANDREWS,
Chief Judge Court of Appeals, New York.

e UNITED STATES OF AMERICA, *ss:*

To Anson E. York & Wallace W. Starkweather, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the Capitol, in the city of Washington, on the 24th day of February, 1896, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York in and for the county of Jefferson, wherein William W. Conde and John C. Streeter are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Charles Andrews, chief judge of the court of appeals of the State of New York, this 25th January, in the year of our Lord 1896, and of the Independence of the United States the one hundred and twentieth.

——— ———.

Allowed.

CHAS. ANDREWS,
Chief Judge Court of Appeals, New York.

Due personal service upon me of a copy of the within citation, at the city of Watertown, Jefferson county, N. Y., is admitted this 27 day of January, 1896.

HENRY PURCELL,
Attorney for Defendants in Error, Watertown, N. Y.

f STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 26th day of November, in the year of our Lord one thousand eight hundred and ninety-five, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding. Gorham Parks, clerk.

Remittitur, November 27th, 1895.

ANSON E. YORK & WILLIAM W. STARKWEATHER, Respondents,
ag'st
WILLIAM W. CONDE & JOHN C. STREETER, Appellants.

Be it remembered that on the 4th day of January, in the year of our Lord one thousand eight hundred and ninety-four, William W. Conde and John C. Streeter, the appellants in this action, came here into the court of appeals, by Brown & Adams, Esqrs., & Watson M. Rogers, Esq., their attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of

the supreme court of the State of New York; and Anson E. York and William W. Starkweather, the respondents in said action, afterwards appeared in said court of appeals, by Henry Purcell, Esq., their attorney; which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

g Whereupon the said court of appeals, having heard this cause argued by Mr. Elon R. Brown, of counsel for the appellants, and by Mr. Henry Purcell, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondents recover against the appellants costs of appeal to this court; and it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed with costs, as aforesaid, and stand in full force, strength, and effect.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted in the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals.

CLERK'S OFFICE, ALBANY, *Nov. 27th*, 1895.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] GORHAM PARKS, *Clerk.*

h STATE OF NEW YORK:

Court of Appeals.

At a term of said court held at the capital, in the city of Albany, on the 24th day of January, 1896.

Present: Hon. Charles Andrews, chief judge, presiding.

ANSON E. YORK & ANO., Respondents,
vs.
WILLIAM W. CONDE & ANO., Appellants.

A motion having heretofore been made to amend the remittitur heretofore issued in this action and after due deliberation thereupon had—

Ordered that the said motion be, and the same is, granted and

the said remittitur hereby corrected and amended by striking out the following words therein: "And, after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed," and by substituting for the words so stricken out the following, viz: "And the said appellants having specially set up and claimed that they were entitled under section 3477 of the Revised Statutes of the United States to hold and retain the sum of twenty-five hundred dollars ($2,500.00), for which amount this action was brought, on the ground that under said section the assignment thereof to the respondents was void, and after due deliberation had thereon, the said court of appeals, having passed upon the said claim of the appellants, did order and adjudge that the said appellants were not entitled to the said twenty-five hundred dollars ($2,500.00) under the said statute, and that the assignment to the respondents was valid; and did order and adjudge that the judgment of the
i court appealed from in this action be in all things affirmed;" and the said remittitur upon the entry of this order shall stand so amended and this order shall become a part of the said remittitur.

A copy.

[L. s.] GORHAM PARKS, *Clerk.*

Entered Jan'y 27, 1896, at 5 p. m.

W. W. KELLEY, *Dep. Clerk.*

To Henry Purcell, respondents' attorney:

Take notice that an order, of which the foregoing is a copy, is this day entered in the Jefferson county clerk's office.

Dated January 27, 1896.

Yours, &c., ELON R. BROWN,

Appellants' Attorney, 10½ *Washington St., Watertown, N. Y.*

j Court of Appeals.

ANSON E. YORK and WALLACE W. STARKWEATHER, Respondents,
against
WILLIAM W. CONDE and JOHN C. STREETER, Appellants.

Papers on Appeal.

From judgment.

Henry Purcell, respondents' attorney, Watertown, N. Y.

Brown & Adams, attorneys for appellant Conde, Watertown, N. Y.

Watson M. Rogers, attorney for appellant Streeter, Watertown, N. Y.

1 STATE OF NEW YORK:

In Supreme Court, General Term, Fourth Department.

STATE OF NEW YORK, *County of Jefferson,* } ss:

I, Frank D. Pierce, clerk of the county of Jefferson, and of the supreme and county courts held therein, do hereby certify that I have compared the following copies of notices of appeal, judgment-roll, case and exceptions with the originals on file in this office, and that the same are true and correct copies thereof, and of the whole of said originals.

Witness my hand and seal of office this 1st day of September, 1893.

[L. S.] F. D. PIERCE, *Clerk.*

Supreme Court, County of Jefferson.

ANSON E. YORK and WALLACE W. STARKWEATHER, Plaintiffs,
against
WILLIAM W. CONDE and JOHN C. STREETER, Defendants.

GENTLEMEN: Please take notice, that the defendant Conde
2 in the above-entitled action appeals to the general term of the supreme court from the judgment of the circuit court, and the order denying motion for a new trial herein entered in the clerk's office of the county of Jefferson, on the 22d day of March, 1893, in favor of plaintiffs, against the said defendants, for $3,370.64, and from the whole of said judgment and order.

Dated at Watertown, N. Y., April 19, 1893.

Yours, &c., BROWN & ADAMS,
Attorney- for Defendant Conde, 10½ *Washington St.,*
Watertown, N. Y.

To the clerk of the county of Jefferson and to Henry Purcell, Esq.

Endorsed: "Filed April 19th, 1893."

Supreme Court, County of Jefferson.

ANSON E. YORK and WALLACE W. STARKWEATHER, Plaintiffs,
against
WILLIAM W. CONDE and JOHN C. STREETER, Defendants.

GENTLEMEN: Please take notice, that the defendant Streeter in the above-entitled action appeals to the general term of the supreme court from the judgment of the circuit court, and the order denying motion for a new trial herein entered in the clerk's office of the

county of Jefferson, on the 22d day of March, 1893, in favor
3 of plaintiffs, against the said defendants, for $3,370.64, and from the whole of said judgment and order.

Dated at Watertown, N. Y., May 4, 1893.

Yours, &c., WATSON M. ROGERS,
Attorney for the Defendant Streeter, 16 *Washington Street, Watertown, N. Y.*

To the clerk of the county of Jefferson and to Henry Purcell, Esq.

Endorsed: "Filed May 4, 1893."

In Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STAR-WEATHER
against
WILLIAM W. CONDE and JOHN C. STREETER.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trail to be held in the county of Jefferson.

Dated this 10th day of July, 1890.

HENRY PURCELL,
Plaintiffs' Attorney.

Office and P. O. address, 20 and 22 Flower building, Watertown, N. Y.

4 In Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER
against
WILLIAM W. CONDE and JOHN C. STREETER.

The plaintiffs, for cause of action against the defendants, allege that at the several times hereinafter referred to they, the said plaintiffs, were and still are copartners in business at the city of Watertown, N. Y., under the firm name and style of York & Starkweather.

That in or about the month of September, 1889, James L. Witherby and James Gaffney, who then and at all times hereinafter referred to, were copartners in the contracting and building business at Watertown, N. Y., and elsewhere under the firm name and style of Witherby & Gaffney, entered into an agreement and contract with the United States Government, by the terms of which they were to furnish all materials and construct certain buildings for the said Government to be known as "officers' quarters," at Madison barracks, Sacket's Harbor, Jefferson county, N. Y.

That thereafter and prior to March 27th, 1890, the plaintiffs, at the request of said Witherby & Gaffney, sold and delivered to them large quantities of lumber and building materials for use by them and which were used by them in the construction and erection of the said buildings for the United States Government, and on the day last aforesaid there was due and owing the plaintiffs from said Witherby & Gaffney on account of said lumber and materials sold to them as aforesaid, the sum of three thousand dollars and over, and the said Witherby & Gaffney on that day in order to pay and secure to be paid to the plaintiffs three thousand dollars of their said indebtedness to plaintiffs, made, executed and delivered to the said plaintiffs an instrument in writing of which the following is a copy:

"Whereas, we have a contract with the United States Government for the construction of buildings and officers' quarters at Madison barracks, Sacket's Harbor, Jefferson county, N. Y.

"And whereas we are indebted to York & Starkweather, of Watertown, N. Y. in the sum of three thousand dollars and more on account of materials furnished us by them that were used in said buildings and quarters.

"And whereas there will be due and payable to us on account of our work, etc., from the Government considerable sums of money before and on the completion of our said work.

"Now, therefore, of the moneys due and to become due us from the said Government we do hereby for value received assign and transfer to said York & Starkweather the sum of three thousand dollars, and do hereby authorize, empower, request and direct Lieut. J. E. Macklin, R. Q. M. Eleventh infantry, U. S. A., through whom payments are made for such construction, to pay to said York & Starkweather on our account for such construction the full sum of three thousand dollars, as follows: First, $500 from the next estimate and payment due or to become due us, and the sum of $2,500 on the completion of said work by us, and when the balance of our contract with the Government becomes due and payable to us.

"Dated March 27th, 1890.

"WITHERBY & GAFFNEY. [L. S.]

"Signed, sealed and delivered in the presence of
"ORRIN J. ROBINSON.
"IRA GARDNER."

That thereafter and on or about the 2d day of April, 1890, the said Witherby & Gaffney paid to apply on their said indebtedness to the plaintiffs the sum of five hundred dollars, and no other payments have been made by them on account thereof.

That on or about May 15, 1890, the said Witherby & Gaffney had furnished and completed their said contract with the said Government, and there was on that day due and owing them from the said Government the sum of about $4,300 on account thereof, and $2,500 of said sum was then the money and property of the plaintiffs by

virtue of the said instrument of assignment executed and delivered to them by said Witherby & Gaffney, as aforesaid, but the officers and agents of the said Government refused to pay the plain-
6 tiffs the said sum of $2,500 on account thereof, and on the same day, to wit: May 15, 1890, it, the said Government, by and through its officers and agents, paid to said Witherby & Gaffney the whole of said sum due and owing them from it, as aforesaid.

That immediately after payment of said moneys to said Witherby & Gaffney, plaintiffs duly demanded that they pay to them from said moneys the sum of $2,500, which had been assigned to them as aforesaid, and of which they were the lawful owners, and said Witherby & Gaffney refused to pay the same or any part thereof.

That thereafter, and on or about the same day, to wit: May 15, 1890, the said Witherby & Gaffney paid over and delivered to the defendants in this action the whole of said sum of about $4,300, which was paid to them on that day by the Government, as aforesaid.

That before such payment and delivery of said moneys to the defendants by said Witherby & Gaffney the plaintiffs duly notified the defendants that they held an assignment and were the owners of $2,500 of said moneys, and the said defendants accepted and received the said moneys from the said Witherby & Gaffney with full notice of the plaintiffs' said assignment of $2,500 thereof.

And of their rights and interests therein and thereto and appropriated the same and the whole thereof to their own use and benefit.

That on or about May 16, 1890, and while the said defendants still had in their possession the moneys paid and delivered to them by the said Witherby & Gaffney, or the check or checks, draft or drafts representing said money, and which had come to them from said Witherby & Gaffney, the plaintiffs duly demanded of them, the said defendants, that they pay and deliver to said plaintiffs from said moneys, check or checks, draft or drafts, the sum of $2,500. And the defendants refused to pay or deliver the same or any part thereof to the plaintiffs, but appropriated the same and the whole thereof to their own use and benefit.

Wherefore, plaintiffs demand judgment against the de-
7 fendants and each of them for two thousand five hundred dollars, with interest thereon from May 15, 1890, besides the cost of this action.

HENRY PURCELL,
Plaintiffs' Attorney, 20 and 22 Flower Building,
Watertown, N. Y.

JEFFERSON COUNTY, } ss:
City of Watertown, }

Anson E. York, being duly sworn, says he is one of the plaintiffs named in the foregoing complaint, that said complaint is true to the knowledge of deponent, except as to the matters therein stated

to be alleged on information and belief, and that as to those matters he believes it to be true.

ANSON E. YORK.

Sworn to before me July 11, 1890.

J. N. CARLISLE,
Commissioner of Deeds, City of Watertown, N. Y.

In Supreme Court, Jefferson County.

ANSON E. YORK and Ano.
vs.
WILLIAM W. CONDE and Ano.

The defendant Conde, answering the complaint in this action, denies any knowledge or information sufficient to form a belief that Witherby & Gaffney made, executed and delivered to the plaintiffs the instrument in writing purporting to be an assignment of the claim of Witherby and Gaffney to the extent of twenty-five hundred dollars ($2,500) as set forth in said complaint, and denies that the said twenty-five hundred dollars ($2,500) or any other moneys or claim were assigned to plaintiffs or became the property of plaintiffs from the said Witherby and Gaffney as assignors or otherwise.

8 This defendant denies that said Witherby and Gaffney paid over to the defendants the whole of the sum of about forty-three hundred dollars ($4,300) as alleged in the complaint, and this defendant alleges upon information and belief that at the time the said Witherby and Gaffney entered into the contract and agreement with the United States referred to in the complaint, and on or about Sep. 9, 1889, this defendant signed, executed and delivered to the United States a bond in the penal sum of thirty-six hundred dollars ($3,600) conditioned for the faithful performance by said Witherby & Gaffney of the terms of their said contract with the United States, and that in default thereof the United States might perform the same and hold this defendant for the loss and damage occasioned by the failure of the said contractors to perform the same; and that this defendant would protect and save harmless the United States any and every default in the performance of said contract of the said Witherby & Gaffney. The execution and delivery of the said bond was a necessary condition of the awarding of the said contract to the said Witherby & Gaffney.

That said Witherby & Gaffney were men of small means and limited credit, and after they entered upon the performance of their contract, being in need of funds to carry on the same, they applied to this defendant as surety aforesaid and requested him to assist them in raising necessary funds to pay for labor and materials necessary to complete the said contract, and the said Witherby & Gaffney being otherwise unable to complete the said contract, this defendant did, in pursuance of the said request, sign and endorse divers promissory notes made by said Witherby & Gaffney, to enable them by the discount thereof to raise the money to complete said

contract, and this defendant continued so to do until the completion of said contract. That after March 1, 1890, and up to the completion of the said contract the notes which defendant had endorsed, as aforesaid, amounted at all times to upward of four thousand dollars ($4,000), and before the endorsement thereof and before the execution of the pretended assignment to the plaintiffs, described in the complaint, the said Witherby & Gaffney promised and agreed with this defendant as a condition of the endorsements to
9 pay over, transfer and assign to this defendant the said contract with the United States Government and all moneys to become due thereon to be applied to the payment of the said notes and to hold the said contract and moneys due or to become due thereon subject to a charge or lien in favor of this defendant to the extent of notes endorsed and moneys advanced as aforesaid to the said Witherby & Gaffney to enable them to perform the said contract.

That on or about April 16, 1890, the said Witherby and Gaffney then applied to this defendant for a further endorsement to the amount of five hundred dollars ($500), and in pursuance of and as evidence of the agreement aforesaid to devote the moneys arising from such contract to discharge this defendant's liability as an endorser, and as a condition of such further endorsement signed, executed and delivered to this defendant, and his codefendant Streeter, the following assignment, to wit:

"WATERTOWN, *Apr.* 18, 1890.

"In consideration Jno. C. Streeter and Wm. W. Conde endorsing note for $500 this day, we agree upon receipt of check which we receive from Lieut. Macklin, for the amount due us, about $4,500, we agree to pay sufficient on notes in Jeff. Co. bank to reduce them to seventeen hundred dollars, and to pay Jno. C. Streeter, individually, $350, and to pay Wm. W. Conde, individually, $250, to apply on their separate accounts and contingent liabilities.

WITHERBY & GAFFNEY."

The said Streeter had likewise endorsed the same notes which this defendant had endorsed for the accommodation of said Witherby & Gaffney.

The moneys and claim and the said assignment referred to as the subject thereof, and the notes therein provided for to be paid, are the same moneys and claim belonging to said Witherby & Gaffney, which are the subject of controversy in this action, and the notes are the same as endorsed by this defendant aforesaid.

And that in further performance of the said understanding and agreement to devote the moneys arising from such contract and the payment of said notes, and to make more explicit the paper
10 of April 16, 1890, above set forth, the said Witherby & Gaffney made, executed and delivered to this defendant and his codefendant Streeter the following assignment, to wit:

"WATERTOWN, *Apr.* 18, 1890.

"That there may be no misunderstanding about the intention of the foregoing agreement, we hereby assign for value received to John C. Streeter and Wm. W. Conde sufficient of the moneys coming to us from Lieut. Macklin, R. Q. M., to pay the claims as specified in the foregoing agreement.

WITHERBY & GAFFNEY."

The defendant further alleges that in pursuance of the said agreement made by the said Witherby & Gaffney to pay over to this defendant for application upon said notes endorsed by him, all moneys arising from such contract with the United States, and to hold the same subject to a charge and lien for the payment of the same, said Witherby & Gaffney did, on or about May 15, 1890, pay over to the defendants in this action the sum of about thirty-seven hundred dollars ($3,700). And the defendants forthwith applied the said moneys to the payment of notes of about that amount given by the said Witherby & Gaffney and endorsed by the defendants as aforesaid, and the said moneys so applied are the same moneys which are the subject of controversy in this action.

The defendant further alleges that at the time he made the endorsements aforesaid and entered into the said agreement with Witherby & Gaffney for the assignment of the moneys arising on the said contract and for a lien thereon, and at the time of the execution of the said assignment aforesaid from Witherby & Gaffney to defendants, this defendant had no knowledge or notice whatsoever that the plaintiffs had, or claimed to have, any interest in the said Government contract or the moneys to be paid thereon.

Second.

This defendant repeats in this answer the denials contained in the foregoing answer, and alleges that the money claim and property claimed by the plaintiffs in this action to have been assigned to them by Witherby & Gaffney at the time of the pretended
11 assignment thereof constituted and was a claim against the United States Government, which had not then been allowed, or the amount due thereon ascertained, or the warrant issued for the payment thereof, and that the pretended assignment thereof does not recite the warrant for payment issued by the United States, and is not acknowledged by the person making the same before an officer having authority to take acknowledgments of deeds, and is not certified by such officer; and that said pretended assignment is in violation of the laws of the United States and of the State of New York, and that the plaintiffs never derived any interest in the said contract with the United States by virtue of the said pretended assignment or otherwise, and are not the real parties in interest in this action and ought not therefore to maintain the same; that said Witherby & Gaffney never transferred any interest in the said contract to the said plaintiffs.

BROWN & ADAMS,
Defendants' Attorneys.

JEFFERSON COUNTY, *ss:*

William W. Conde, being duly sworn, says that he is the defendant named in the foregoing answer, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

W. W. CONDE.

Subscribed and sworn before me Sept. 10, 1890.

J. NELLIS,
Notary Public.

In Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER
vs.
WILLIAM W. CONDE and JOHN C. STREETER. } Answer.

I.

12 The defendant, John C. Streeter, for himself separately answering the complaint herein, denies any knowledge or information sufficient to form a belief whether James L. Witherby and James Gaffney made, executed and delivered to plaintiffs an instrument in writing, purporting to be an assignment of a claim of said Witherby & Gaffney to the extent of $2,500, as set forth in said complaint; and on information and belief he denies that the said $2,500, or any part thereof, or any claim, were thereby assigned to plaintiffs, or became the property of plaintiffs from the said Witherby & Gaffney as assignors, or otherwise; and he denies that the said Witherby & Gaffney paid over to the defendants the whole of the sum of $4,300 at the time and as alleged in the complaint, or at any other time or in any other manner.

II.

The said defendant, for a second and further separate answer and defense herein, alleges that at the time the said Witherby & Gaffney entered into the agreement and contract with the United States referred to in the complaint, they, the said Witherby & Gaffney, were and ever since have been men of small means and limited credit; that after entering upon the performance of their said contract with the Government of the United States, being in need of funds to carry on the same, they applied to defendants and requested the defendants to assist them in raising funds for labor and materials necessary to complete the said contract, they, the said Witherby & Gaffney, being otherwise unable to complete the same; and these defendants thereupon, in pursuance of the said request, separately advanced certain moneys, and together signed and endorsed divers promissory notes made by the said Witherby & Gaffney, to enable them, by the discount thereof, with said advances, to raise the money necessary to complete said contract; and the defendants, from time to time,

continued so to do until the completion thereof; and after March 1st, 1890, and down to the completion of the said contract, the moneys so advanced, and the notes which the defendants had endorsed and signed as aforesaid, amounted, at all times, to upwards of $4,000.

That before the signing and endorsement of said notes and
13 advancement of said moneys, and before the execution of the pretended assignment to the plaintiffs mentioned in the complaint, the said Witherby & Gaffney promised and agreed to and with the defendants, as a condition of the endorsement, to pay over, transfer and assign to them, (the defendants), the said contract with the United States Government and all the moneys to become due thereon, the same to be applied to the payment of the said notes and advances, and that the said defendants should have a lien and charge on said contract and all moneys to become due thereon as a security and indemnity in their favor to the extent of the notes signed and endorsed and the moneys advanced as aforesaid to and for the said Witherby & Gaffney to enable them to perform the said contract.

That on or about April 16, 1890, the said Witherby & Gaffney applied to defendants for further endorsement to the amount of $500, and in pursuance of and as evidence of the agreement aforesaid to devote the moneys arising from said contract to discharge the defendants' liability as endorsers and to give the defendants a lien and charge thereon, and as a condition of said further endorsement, signed, executed and delivered to the defendants an instrument in writing, of which the following is copy, to wit:

"WATERTOWN, *April* 16, 1890.

Consideration, John C. Streeter and William W. Condee, endorsing note for $500 this day, we agree, upon receipt of check which we receive from Lieut. Macklin for the amount due us, about $4,500, we agree to pay sufficient on notes in Jefferson County bank to reduce them to $1,700, and to pay John C. Streeter individually $350, and to pay William W. Condee individually $250 to apply on their separate accounts.

WITHERBY & GAFFNEY."

The moneys and claim in the said assignment referred to *is* the subject thereof, and the notes therein provided for to be paid are the same moneys and claim belonging to said Witherby & Gaffney, which are the subject of controversy in this action, and the notes are the same as endorsed by the defendants as aforesaid.

14 That in further performance of the said understanding and agreement and to devote the moneys arising from said contract to the payment of said notes and advances, and to make more explicit the paper of April 16, 1890, before set forth, the said Witherby & Gaffney made, executed and delivered to these defendants the following instrument, to wit:

"WATERTOWN, *April* 18, 1890.

That there may be no misunderstanding about the intention of the foregoing agreement, we hereby assign, for value received, to John C. Streeter and William W. Condee, sufficient of the moneys coming to us from Lieut. Macklin, Q. M., to pay the claims as specified in the foregoing agreement.

WITHERBY & GAFFNEY."

The defendant further alleges that in pursuance of the said parol and written agreements made by said Witherby & Gaffney to pay over to these defendants for application upon said notes endorsed by them, all moneys arising from said contract with the United States and to hold the same subject to a lien and charge for the payment of said notes, said Witherby & Gaffney did, on or about May 15, 1890, pay over and deliver to the defendants in this action the sum of about $3,700, and no more, and the defendants forthwith applied the said moneys to the payment of notes of about that amount given by said Witherby & Gaffney and endorsed by defendants as aforesaid, and the moneys so applied are the same moneys mentioned and set forth in the complaint, and were obtained as hereinbefore stated, and not other or different.

That at the time of making the endorsements aforesaid and entering into the said agreement with Witherby & Gaffney for a lien and charge upon and assignment of the moneys arising on said contract, and at the time of the execution of said assignment from Witherby & Gaffney to the defendants, this defendant had no knowledge or notice whatsoever, that the plaintiffs had, or claimed to have any interest in said Government contract, or the moneys to be paid thereon.

III.

15 The said defendant, for a third and separate answer and defense herein, on information and belief alleges that the money, claim and property claimed by the plaintiffs in this action to have been assigned to them by said Witherby & Gaffney at the time of the pretended assignment thereof to the plaintiffs, constituted, and was a claim against the United States Government, which had not then been allowed, nor the amount ascertained, nor the warrant issued for the payment thereof, and that the pretended assignment thereof does not recite the warrant for payment issued by the United States, and it is not acknowledged by the person making the same before an officer having authority to take acknowledgment of deeds, and is not certified by said officer, and that said pretended assignment to the plaintiffs is in violation of the laws of the United States and of the State of New York, and that the plaintiffs did not acquire, and have not acquired any interest in the said contract with the United States by virtue of the said pretended assignment, or otherwise, and are not the real parties in interest in this action, and ought not to have or maintain the same; that the said Witherby & Gaffney never transferred any interest in said con-

tract, nor the moneys arising, or to grow due, thereon to the said plaintiffs.

WATSON M. ROGERS,
Attorney for Def't Streeter.

STATE OF NEW YORK, } ss:
County of Jefferson, }

John C. Streeter. being duly sworn, deposes and says, that he is the defendant, who makes the foregoing answer in this action; that he has read the said answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JNO. C. STREETER.

Sworn to before me, this 4th day of October, 1890.
THOS. F. KEARNS,
Notary Public.

16 At a circuit court and court of oyer and terminer, held at the court-house, in the city of Watertown, in and for the county of Jefferson, on the 6th day of March, 1893.
Present: Hon. P. B. McLennan, justice.

Supreme Court.

ANSON E. YORK and Ano. *vs.* WILLIAM W. CONDE and Ano. } Henry Purcell, C. H. Walts. March 9, 1893. Brown & Adams, Watson M. Rogers.

Jurors.

A. L. Rogers,	Wayne B. Brewster,
Harley A. Stebbens,	S. L. Lyman,
O. H. Caswell,	Chas. W. Smith,
James Cline,	Peter Dorr,
Leman Tucker,	Edward Smith,
James Casselman,	Winfield S. Rogers.

Witnesses.

For plaintiffs.	For defendants.
Anson E. York.	William W. Conde,
	John C. Streeter.

S. M. Byam and T. T. Ballard sworn as officers.
Jury found a verdict for the plaintiffs for $2,921.25.

A copy.

GEO. H. COBB,
Deputy Clerk.

17 In Supreme Court, State of New York, *ss:*

At a circuit court and special term of the supreme court, held at the court-house in the city of Watertown, Jefferson county, N. Y.,

in and for the fifth judicial district of the State of New York on the 20th day of March, 1893.

Present: Hon. P. B. McLennan, justice presiding.

ANSON E. YORK and Ano.
vs.
WILLIAM W. CONDE and Ano.

The defendants having moved for a new trial at this term of court on the judge's minutes and to set aside the verdict for $2,921.25 on the grounds that the same is for excessive damages and is contrary to the law and to the evidence in the case and also upon the exceptions taken during the trial and after hearing E. R. Brown, counsel for said defendants in favor of said motion, and Henry Purcell, counsel for plaintiffs in opposition thereto, it was ordered that said motion be and the same is hereby denied.

Further ordered that execution on judgment herein be stayed for thirty days after entry thereof, and that the defendants have sixty days in which to prepare the case and exceptions herein.

P. B. M., *J. S. C.*

Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STAR-WEATHER
against
WILLIAM W. CONDE and JOHN C. STREETER.

Judgment, March 22d, 1893, 9.30 a. m.

18 The issues in this action having been brought on for trial before Mr. Justice McLennan, and a jury, at a circuit court held in the city of Watertown, N. Y., in and for the county of Jefferson, commencing on the sixth day of March, 1893, and the said issues having been duly tried, and the jury having, on the tenth day of March, 1893, returned a verdict for the plaintiffs and against the defendants for the sum of two thousand nine hundred and twenty-one dollars and twenty-five cents, and the plaintiffs' costs and disbursements having been taxed by the clerk of the court at the sum of four hundred and forty-nine dollars and thirty-nine cents, it is now, on motion of Henry Purcell, attorney for the said plaintiffs, ordered and adjudged that the said plaintiffs, Anson E. York and Wallace W. Starkweather, recover of said defendants, William W. Conde and John C. Streeter, two thousand nine hundred and twenty-one dollars and twenty-five cents, found by the jury as aforesaid, together with four hundred and forty-nine dollars and thirty-nine cents costs and disbursements as adjusted and taxed, amounting in all to the sum of three thousand three hundred and seventy dollars and sixty-four cents, and that the plaintiffs have execution therefor.

F. D. PIERCE, *Clerk.*

In Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER
vs.
WILLIAM W. CONDE and JOHN C. STREETER. } Case and Exceptions.

This case was brought on for trial at the March circuit held in Watertown, N. Y., before Hon. Peter B. McLennan, and a jury.

ANSON E. YORK, sworn for plaintiff, examined by Mr. Purcell:

I reside in this city; am one of the plaintiffs in this action; my partner is W. W. Starkweather, and we constitute the firm
19 of York & Starkweather; our relations as copartners terminated January 1, 1892; we had been copartners prior to that time for ten or twelve years; I know James Gaffney and James Witherby; in the fall of 1889, they had a contract with the U. S. Government for the construction of officers' quarters at Sacket's Harbor; we commenced business with them September 27, 1889.

Mr. BROWN: I desire to make a suggestion here in view of the fact that the witness' evidence lies before the court, so that we know just what the examination is tending to. No dispute is made as to the existence of the evidence alleged in the assignment. A detailed account of the relations between York & Starkweather and Witherby & Gaffney,—especially that part of it tending to show that there was indebtedness beyond the amount of the consideration of this assignment,—is distinctly calculated to divert the attention of the jury from the issue in the case, and I therefore desire to raise the point now.

The COURT: The counsel may either take the concession, or he may go on and give the entire transaction with these parties. We will try to eliminate anything that is not pertinent to the issues.

Mr. BROWN: I desire for the purpose of putting myself fairly on the question, to suggest that we stand ready to admit that Witherby & Gaffney executed and delivered the assignment in question on March 27, 1890, to York & Starkweather, and that the indebtedness of Witherby & Gaffney is correctly stated therein; that a draft to the amount of forty-four hundred dollars to which said assignment related, was delivered by the Government to Mr. Gaffney on May 15, 1890, and by him delivered to the defendants on that day; that while such draft was in their hands, the plaintiffs demanded twenty-five hundred dollars thereof, and fully notified the defendants of the terms of such assignment, and the defendants refused to pay the same, or any part thereof to the plaintiffs. I make this because there is no question on that evidence, and we have been troubled somewhat on prior trials by facts creeping in that were foreign to the issue.

Mr. PURCELL: I accept the offer so far as stated.

The COURT: Is there anything else wanted?

20 Mr. PURCELL: Yes.

The COURT: I suppose it is conceded that York & Stark-

weather were at the times in question copartners; and that Witherby & Gaffney were copartners at the times in question?

Mr. BROWN: Yes.

The COURT: And this contract with the Government existed between the Government and Witherby & Gaffney?

Mr. BROWN: Yes.

The COURT: Were Conde and Streeter partners?

Mr. BROWN: No.

Mr. PURCELL: Will you admit the fact that the indebtedness to York & Starkweather from Witherby & Gaffney was for lumber and materials furnished by them to Witherby & Gaffney, which were used by Witherby & Gaffney in the construction of the officers' quarters at Sacket's Harbor?

Mr. BROWN: We do, pursuant to the contract mentioned in your assignment.

The COURT: And they were used pursuant to the contract between the Government and Witherby & Gaffney?

Mr. BROWN: Yes.

The COURT: That would seem to cover it, Mr. Purcell.

Witness continues:

The paper marked Exhibit 1 is the assignment in question; after the assignment was executed I received from Witherby & Gaffney five hundred dollars to apply thereon, which was to apply on notes, endorsed on notes that were lying at the bank past due; the assignment was given to cover a note signed by Witherby & Gaffney, dated March 3, 1890, for three thousand dollars, payable thirty days after date; the note was given by them on account of lumber
21 and materials furnished prior to the time of taking the assignment, and the five hundred dollars we received was endorsed on this note.

(Note marked Exhibit 2.)

Exhibits 1 and 2 offered in evidence and received.

"EXHIBIT 1."

See complaint.

"EXHIBIT 2."

$3,000.00. WATERTOWN, N. Y., *March* 3, 1890.

Thirty days after date, we promise to pay to the order of York & Starkweather three thousand dollars, at National Bank and Loan Co. Value received with interest.

WITHERBY & GAFFNEY.

On the same day that we took the assignment, we executed the paper (marked Exhibit 3) to Witherby & Gaffney, read in evidence, and is as follows:

"WATERTOWN, N. Y., *March* 27, 1890.

Having this day received from Messrs. Gaffney & Witherby a written order on Lieutenant J. E. Maclin for the payment of three thousand dollars, from balance due or to become due on contract

with the Government of the United States for buildings at Madison barracks, do hereby promise them that when the said money is so received, it shall be applied as payment on a certain promissory note we now hold against the said Gaffney & Witherby for three thousand dollars.

YORK & STARKWEATHER."

The note mentioned in Exhibit 3 is the note marked Exhibit 2.

Mr. PURCELL: I think your admission covered fully our serving a notice upon you.

Mr. BROWN: It did.

It is conceded that prior to the time the draft was turned over by Witherby & Gaffney to the defendants, Mr. York notified the defendants at Sacket's Harbor, on the same day, that he held a
22 written assignment of the fund to the extent of twenty-five hundred dollars or three thousand dollars, upon which five hundred dollars had been paid.

Witness continues:

On the morning of the day following, the one on which the defendants and myself were at Sacket's Harbor, I saw the defendants in this city; had a conversation with them relative to this assignment in Mr. Conde's store; they requested me to lend them the assignment; I demanded the money of them in that conversation, but they didn't pay it or any part of it; they said they wanted to show the assignment to counsel; I don't know that they were both together at that time; they were both there that morning; I saw them both there, but I think Mr. Conde was the one that made the request; I saw Mr. Conde later in the day when he returned the assignment to me; I understood from what he said that he had consulted counsel with reference to it, and when he returned it, he refused to pay; in the talk at Sacket's Harbor when I demanded the money and notified the defendants of our assignment, they said that Mr. Gaffney was owing them as endorsers, and the substance of their talk was that they were looking for that identical draft that we were looking for to reimburse them for their endorsements.

Q. Was there anything said in any of these conversations with Conde and Streeter about their having an assignment of this fund?

Objected to by defendants as incompetent and immaterial. Overruled. Exception.

A. There was not.

Plaintiff rests.

Mr. BROWN: Each of the defendants move separately in his own behalf for a nonsuit on the ground that the plaintiff *has* failed to make out a cause of action against him; on the ground that the original transfer or assignment of this claim against the United States Government was void upon its face, under section 3477, and other related sections of the Revised Statutes of the United States.

Also that the plaintiffs have not the capacity to sue under section 1910 of the Code of Civil Procedure.

23 Motion denied, exception to each defendant.

WILLIAM W. CONDE sworn for defendants, examined by Mr. Brown

I am one of the defendants in this case; I am a hardware merchant in this city; and have been for nearly fifteen years; I was a surety to the United States Government for Witherby & Gaffney, on a contract for the construction of quarters at Sacket's Harbor; I think the contract was about eighteen thousand dollars, approximately that; the endorsements that I made for Witherby & Gaffney as they existed prior to March 27th are as follows: There was one note dated February 21, 1890, and due May 4, 1890, of seven hundred dollars; the bank has it $708 51 as due May 4th; then there was one, dated February 14, 1890, due May 5th, for two thousand dollars; there was one dated December 16, 1889, due February 19, 1890; the bank has it $707.35; there was one dated January 23, and due March 26th; that as I remember it was a one-thousand-dollar note, and there was a partial payment of five hundred dollars on it, made March 21, 1890; there was one dated March 17, 1890, due May 20th for three hundred dollars; that is all that is here except two; these notes amounted to forty-two hundred dollars; that was the state of the account on the 27th day of March; these notes were all endorsed by myself and Streeter for the accommodation of Witherby & Gaffney; no other consideration whatever; on April 16, 1890, we endorsed a note due May 13, for five hundred dollars, and on April 28, another due May 31, for two hundred dollars; on the occasion of endorsing the five-hundred-dollar note in April, I wrote out the memorandum, Exhibit 4, and Witherby & Gaffney signed it at that time.

Received and read in evidence.

"EXHIBIT 4."

"WATERTOWN, *Apr.* 18, 1890.

"Consideration, Jno. C. Streeter and Wm. W. Conde endorsing note for $500 this day, we agree upon receipt of check which we receive from Lieut. Macklin, for the amount due us, about $4,500, we agree to pay sufficient on notes in Jeff. Co. bank to reduce

24 them to seventeen hundred dollars, and to pay Jno. C. Streeter, individually, $350, and to pay Wm. W. Conde, individually, $250, to apply on their separate accounts.

"WITHERBY & GAFFNEY."

And two days later Mr. Gaffney signed the name of Witherby & Gaffney to the next memorandum here, marked Exhibit 5.

Read in evidence.

"EXHIBIT 5."

"WATERTOWN, *Apr.* 18, 1890.

"That there may be no misunderstanding about the intention of the foregoing agreement, we hereby assign for value received to John C. Streeter and Wm. W. Conde sufficient of the moneys coming to us from Lieut. Macklin, R. Q. M., to pay the claims as specified in the aforegoing agreement.

"WITHERBY & GAFFNEY."

The five-hundred-dollar note and the two-thousand-dollar note had not been renewed; they were new notes; we began endorsing for Witherby & Gaffney along about September, 1889; I think the first endorsement was a one-thousand-dollar note; these notes that I have stated were the continuation of the endorsements which we had begun back in September, 1889; they were either renewals or discounts of new sums; I can't distinguish which; prior to March 27, 1890, at the time of the endorsement of some of these notes, I had a conversation with Mr. Gaffney in regard to securing me for my endorsements; I had a small account against Witherby & Gaffney for hardware and merchandise sold them that went into the barracks on the 27th of March amounting to $264.58, and at the completion of the work, they were owing me $470.58, on which there is a credit of $24.26, leaving the amount of the personal account $446.32; the conversation that I had with Mr. Gaffney in relation to securing me for my endorsements occurred, I think, as far back as in December, 1889; don't think I can give the exact words; I had so many conversations in regard to securing; at that time I told him that we were on considerable paper there, and I began to feel a little nervous about it, and I asked him what he could do to fix it so that we would feel secure about it, and he said he would do anything that we wanted him to do; he says, "I will give you an order on Maclin, or I will assign the contract to you," and wanted me to make some suggestion.

(It was here conceded that Lieutenant Maclin was quartermaster and disbursing agent of the United States Government at Sacket's Harbor.)

He said that he would give us an order on Lieutenant Maclin, or if we wished, he would assign the contract right over to Streeter and myself; I replied that we didn't want the contract: we wanted to be in some shape where we would be sure of our pay, and I think there was very little else said; then I think I let the matter drop there to have a talk with Maclin, and I did have a talk with Lieutenant Maclin after that.

Mr. PURCELL: I object to what Lieutenant Maclin said as incompetent and immaterial and hearsay.

The COURT: I don't see how it is competent.

Mr. BROWN: We want to prove it. We will offer to show that Lieutenant Maclin informed the witness that an order given by

Witherby & Gaffney for the payment coming to Witherby & Gaffney would be without value. He would not recognize it.

The COURT: I don't see how that would bind the plaintiffs or affect them in any way.

Objection sustained. Exception.

I had a talk with Maclin; I had another talk with Gaffney, but can't say positively when it occurred; it occurred at the time of endorsing or renewing notes, and I think it was either in December or January; I told Gaffney Lieutenant Maclin would not accept this order if he gave it to me, inasmuch as we didn't want the contract, and then he told me that all our notes should be paid out of that last money, the final estimate, the percentages that the Government was keeping back for faithful performance of the contract; and I asked him if we could feel sure that we were going to get it out of that money; he says, "You can, that money will be kept purposely for that;" and he says, "If necessary, I will turn
26 over the check or draft for the money for you to take up these papers;" the account owing me was talked over right in with the rest; can't say that it was mentioned every time, because the notes were more important in my mind than the account was; I can't say just the time when I had a conversasion with Gaffney in which the account was mentioned; but he told me that that account should be paid from the last money, and I made an agreement with him that the account should run until the final payment; I was not to ask him for any pay on it before that; at subsequent times after this conversation that I have related, when we were making these endorsements, the question would come up; says I, "Can we rely upon these promises that you have been making to us?" and he assured us that we could; that that money would be kept for that purpose; I think those talks came up at every renewal, at every endorsement, that we asked reassurance from him; on the 15th of May we got a check or draft from Mr. Gaffney and took it to the Jefferson County bank, and with the proceeds paid up thirty two hundred dollars of our endorsed notes, and paid Mr. Streeter, check, $350.00, and I took $250.00 to apply on my account in the store; the amount they finally took was about forty-four hundred dollars; I reduced the face value of the endorsements thirty-two hundred dollars; according to the bank's statement we paid up on these notes $3,235,50; it is a statement from the cashier of the bank; I believe that to be right; I paid Mr. Streeter $350 for endorsements, and my own personal account was $250, and the balance, amounting to $628, I turned over to Mr. Gaffney; at the time Mr. Gaffney gave me the check or draft he said I must pay him back the balance above what we kept; that he wanted to pay labor with; I agreed to do it at the time he handed the draft over to me; this money that was got on these endorsements Gaffney & Witherby told me that they were using it in their contract at Sacket's Harbor, and the material I sold them from the store they used for the same purpose.

Cross-examination:

I have had business relations with Mr. Gaffney prior to this one. He built a sewer up on Rutland street; my impression is that it involved some eight or nine thousand dollars; it was a contract that he took from the city, and I was surety for him on that
27 contract; I sold him the sewer pipe that went into the construction of that sewer; Gaffney paid me for all I sold him; I don't remember that I then took assignment from him against any one to secure me; he had a contract at Utica for the building of a sewer subsequent to the Rutland Street sewer; I was surety for him on that; I took no security from him against liability on that bond; I sold him some material for the construction of the Utica sewer; not a large amount, as it was a brick sewer; I had confidence in him sufficient to become his surety on these contracts; the bond to city of Watertown was some $8,000, and one to Utica smaller; I was surety for him on the Sacket's Harbor contract; the bond I think was thirty-seven hundred dollars, and the contract was for eighteen thousand dollars; that is my impression; I can't give the exact figures; my liability was limited to thirty-seven hundred dollars; I had frequent conversations with Mr. Gaffney as to how he was getting along with his contract at Sacket's, and also as to how he was keeping up his payment for materials there, and he on each occasion assured me that he had the material nearly all paid for; he also assured me that he had the labor paid for as work progressed; I am not able to give any date on which he told me that the material was not nearly paid for; he never told me that it was not nearly paid for until I had found out from other sources prior to the 27th of March; I knew he was getting lumber and material for the construction of officers' quarters from the plaintiffs, I think I learned it as early as the fall previous; I asked him if he was paying for the material that he got of plaintiffs, and he told me that he was keeping his material practically largely paid for, or words to that in substance; I understood prior to March 27th that he was owing very largely; I received the information from Mr. York himself; he came into my store, and told me all about it; it was some time in the winter before the 27th of March; I can't tell positively whether this talk with York was after or before I had the talk with Gaffney about taking security; it was three years ago.

Q. Did you ever take an oral assignment of a claim before this one?

A. No.

28 Q. Did you know at the time that you could take an assignment orally of such a claim as this?

A. No, sir: some of the notes which I have mentioned here are renewals; at the renewal of the first note I don't think there was anything said about Gaffney's paying these notes out of moneys from the last estimate by the Government, the percentages that were kept back from him; he simply wanted to carry it along, that his estimate at that time was not sufficient to take it up; I won't say that we talked about security at the next conversation; the conver-

sations generally occurred in my store; the one that we were quarreling about occurred in my store; I don't think there was any one present except Gaffney and I; I won't say whether Mr. Streeter was present at that time or not; there were some talks that I had individually, and some when Mr. Streeter was present; I told him at that time that I wanted security, and he replied that he would do anything I wanted him to do—assign the contract to me, or he would give me an order on Lieutenant Maclin; I said I didn't want the contract and subsequently investigated about this order on Lieutenant Macklin, and found it would not do; I saw Macklin and asked him about it; the lieutenant said he could not accept an order; I don't remember anything else that was said by Gaffney on this occasion; at that time I didn't understand that he owed any very large bills; he was owing us considerable; I continued to sell him hardware and material which is not all paid for yet; he still owes me $196.27; I sold him all told $470.58, less $24.26 merchandise returned, worth of material that went into the buildings at Sacket's Harbor; and this was all paid for but $196.27; when he asked me to endorse in January or February, I questioned him about the contract, and how he was getting on; he told — he was keeping the materials largely paid for, in fact nearly all; I had no reason to doubt him at that time; he told me that the large amount the Government was keeping back, which would come in on the final settlement would be sufficient to take care of the notes, and they would all be paid; he told me that the amount was twenty per cent.; I think the first time he promised to turn over the check to me was after the talk I had with Lieutenant Maclin; I can't say that I ever told about the talk with Lieutenant Maclin until today; don't know that
29 the question was ever asked me; my best recollection is that it was after I had seen Lieutenant Maclin that he said he would turn over the check to me when it finally came; after refreshing my memory by reading the printed case last trial, I think that the conversation in which Gaffney offered to assign the contract to me, or to do anything I wanted, and that he also said that he would turn the check over to me was in my store in December or January; after that I saw Lieut. Maclin in the city, and had a talk with him about the order in which he said that he could not take it or accept it; I never learned from Gaffney that he had made any kind of a writing to these plaintiffs; I learned on one occasion that the plaintiffs had a paper from Gaffney, but didn't understand the nature of the paper, simply it was told to me that they had an order; that was the way it was told to me; from Witherby and Gaffney against this fund; I should think I learned that between March 27th and April 16th; I can't say what the date was, after April 1st, I think it was before I made this writing on April 16th; I spoke to Gaffney about it the first time I saw him afterwards; on April 16th, he wanted me to endorse a five-hundred-dollar note, and at that time I made a writing; the one that has been read in evidence by Mr. Brown; the writing was that in consideration of myself and Mr. Streeter endorsing a five-hundred-dollar note, that he agreed upon receipt of the check from Maclin, he would pay the notes in the

Jefferson County bank; in this action we are trying here, I claim this money was due Streeter and I by virtue of an agreement, so that when I wrote on April 16th, the amount due us, "Witherby & Gaffney," I did not write it correctly; it was a casual memorandum; that is not exactly what Gaffney promised to do in the talk in December or January, that on receipt of the check he would pay the notes; I wrote the words in the memorandum "the amount due us from the Government, Witherby & Gaffney;" I now claim it was due to Streeter and me; two days afterwards on April 18th, I took another writing from him; the one of the 16th I wrote, and the one of the 18th I wrote, but think my lawyer dictated it; I took an assignment in writing from Witherby & Gaffney, and had his promise which I claim to be an assignment away back about March 27th.

Q. You took another writing or some other security from Witherby & Gaffney, did you not?

30 A. Yes.

Mr. BROWN: I object to that and move to strike it out that he took another security.

Mr. PURCELL: I don't offer it for the purpose of showing anything except that they were relying upon writing instead of oral agreement. The offer is to show that on March 26th they took mortgage on real estate to secure them against liability on these particular notes.

The COURT: Not for the purpose of showing that it is a valid security, or anything of that kind. That is a security that they can enforce, but for the purpose of showing that they did not rely upon the verbal agreement.

Mr. PURCELL: Yes; that they took a written security one day before our written assignment, it being a mortgage on real estate owned by Mrs. Gaffney, the wife of Mr. Gaffney. That is the only purpose of it.

Mr. BROWN: That question has been before the general term.

Mr. PURCELL: But I don't think the decision of the general term held that we could not prove that fact.

The COURT: The only question is whether it may not be proper evidence. How important it is is another question. Simply as affecting the question whether or not the defendant understood that he had a valid assignment of the claim prior to March 27th, or of this check, the amount that was to become due on this contract prior to March 27, 1890; whether it was not competent evidence as bearing upon that question. Clearly under the decision of the general term, it could not affect his rights under this assignment.

Mr. PURCELL: That is all the purpose of the evidence.

The COURT: I think upon that theory alone, for that purpose solely, that I will admit the testimony, and give you an exception.

31 Mr. BROWN: I object to it as incompetent, immaterial and irrelevant, and except.

Witness continues:

I took a mortgage on March 26, 1890, from Mrs. Gaffney, the wife of James Gaffney himself, to secure myself and Streeter against our liability as endorsers for Witherby & Gaffney.

Same objection and exception.

The mortgage was prepared in Brown & Adams' office, and put on record; this mortgage, of course, was in writing, and was recorded the same day it was given; on May 15th, I did not say to York at Sacket's Harbor that I had an assignment of that fund, and I didn't tell him the following morning that I had any such thing; when he let me take his written assignment for my counsel to examine I made no mention of any assignment to me, nor did I mention it when I returned his assignment to him; Mr. Streeter went with me to the bank to take up the note, and my impression is that Gaffney did not go; Gaffney was not there to receive the balance of the money; it was not paid to him just then; we retired $3,233 of the notes; I gave the balance of the money to Gaffney in my store.

Redirect:

I should say that the credit of Witherby & Gaffney in January and February, 1890, was limited; I stated this morning that at first my impression was that there was a lapse of time between the conversation with Gaffney about his assigning the contract to me, and the conversation about turning over the check or draft, and my attention was called to the testimony on the previous trial that it was at the same time, and on casually looking that over, I came to the conclusion that I had testified before, that it was the same time, and I wish now to change it and testify that it was as my first impression was, that there was a lapse of time there.

Recross-examination:

There is nothing said that there was a lapse of time between these two conversations in the appeal book; I say now as I first
32 said this morning, that my impression is that there was a lapse of time in there; I stated on the other trial that I had a talk with Gaffney, when he offered to assign or transfer the contract to me, which was about January or February, 1890; I think it was in my store; we had talks sometimes in my store and sometimes in Mr. Streeter's office; he asked me for more money, and for further endorsements; I questioned him on his contract, how he was coming out, and he said to me that he was keeping his material largely paid for,—in fact, nearly all,—but still wanted more money; he told me the same as before that the large amount the Government was keeping back which would come to him on the final settlement, all the notes would be paid at that time; I state now that the time he first talked to me about assigning the contract over, assigning the contract, or giving me an order on Maclin, that there was a lapse of time in my impression before the first offer to turn the check or draft over to him; I also stated on the other trial that in

the same conversation, he said if it was necessary he would assign the contract to me, and I told him I didn't want the contract; all that I wanted was to be assured of my pay for what I had furnished them and endorsed for them.

JOHN C. STREETER, defendant, sworn:

I am a resident of this city, and have been all my life; was formerly a merchant here and postmaster; I remember making endorsements for Witherby & Gaffney in the fall and winter of 1889 and 1890; the total amount of our endorsements on the 27th of March was forty-two hundred dollars; those were the endorsements of Streeter & Conde; I had an endorsement outside of that for $350.00, and I was making the endorsements in January, December and February; I saw Mr. Gaffney on the occasion of making endorsements in December and had a conversation with him in Mr. Conde's store, when Mr. Conde was present about securing us for these endorsements; I says to him, "I am not exactly satisfied with the way this is moving, and it seems as though we should have some security, in some shape or indemnity," and he claimed that there was so much being held back, twenty per cent., which rendered him unable to meet his demands for labor &c., from the estimates that they were giving him; he said that he would secure us in any way he could, and he would assign the contract to us;
33 we had got to carry him along until the work was finished, and the final estimate when he received it from the Government, it should be turned over to us to liquidate and wipe out whatever responsibility or liability we had incurred for him; that was about the sum and substance of it; I had several talks with him at my office when Mr. Conde was not present in January and February; the one that is most clear in my mind was in February when he asked for a two-thousand-dollar note, February 14th; he said that we should have the draft when it came in the final settlement, to liquidate all this paper; and, in addition, that this was a sacred debt, and nothing should step in the way of its being carried out; he said that our separate endorsements should come in just the same; afterwards on April 16 and 28th. I signed the endorsement of the five-hundred-dollars and two-hundred-dollar notes; Mr. Conde had the memorandum that Witherby and Gaffney signed at that time; these endorsements were accommodation endorsements; we had no benefit or advantage for making them, and had no dealings with Mr. Gaffney except as accommodation; I know that Witherby & Gaffney had pretty light credit that winter.

Cross-examination:

I think I had known Mr. Gaffney six or eight years prior to these endorsements; I have had business dealings with him; rented him a store, and think I was surety for him on a sewer contract with Mr. Conde; I once sold him a stock of goods for which I took notes and carried them along for him, small amounts; when I became surety for the sewer contract, I did not take any security from him

against my liabilities; I think I have stated all the business transactions I had with Gaffney prior to the Sacket's Harbor deal; he didn't pay all the paper that I endorsed for him; I think I had two notes which had not been paid for the stock of goods I sold him; the first endorsement that I made for him growing out of the Government contract was in September; that was a piece of paper for seven hundred dollars; he agreed that after they got their first estimate, which would be a month hence, they would retire this paper; he didn't do it; I continued to endorse for him along until December and January; the conversation I had with him in December in relation to security was in my office; I said that as these things
34 were maturing and not being paid, that we didn't know what magnitude they would reach, and it was time we were put in shape in some way in this matter with security; and he said to me that he would do anything that was required of him that he could do—turn over the contract, or secure us in any way; from my office we went up to Mr. Conde's office, and the conversation was repeated; I went with Mr. Gaffney up to Mr. Conde's office, or met him there, and we had further talk; I think it was after I had endorsed for him individually; I have no memorandum showing when I endorsed for him individually; my entire individual endorsement is $350.00; it is an endorsement outside of this business; on every occasion he told me he would turn over this check, and I said he must protect the $350 note which had not then matured, which he agreed to do; he said he would pay my liability out of the fund; I can't tell you exactly when he first said that he would pay the notes in the Jefferson County bank out of the fund which was coming to him out of the Government, but it was some time when we were called upon to make an endorsement in January, about the 1st, and the language was that he would use this check to pay those notes; pay what we were liable for upon those notes; he also said that he couldn't move without us; that we had furnished him his money, and he had got to do as we said in the matter as regards security, and if we would continue to help him, he would take this particular fund, and retire those notes; I think this conversation was February 14th, when we endorsed the two-thousand-dollar note; don't recollect saying anything to Mr. York about this transaction when I talked with him at Sacket's Harbor; think I went with Mr. Conde to take counsel on the question of the first assignment of the fund; I think I saw Mr. York after that, and told him that our claim we thought was ahead of his; that we were better entitled to our money than he; I can't say when I told him that, but I think that is the conversation that I made after I visited counsel; I learned very soon after March 27th, that York & Starkweather had an order on Lieutenant Maclin for part of this fund; I knew they were furnishing some materials to Witherby & Gaffney; I learned it prior to the time that we went down there to Sacket's Harbor; I knew of the paper that Mr. Conde drew on April 16th; read it myself; I think I knew it before I endorsed the note for
35 five hundred dollars on April 16th; I knew of the preparation of the paper April 18th relating to the assignment of

this same fund to myself and Mr. Streeter; think it was done by Mr. Conde principally; I suggested we had better get it; we took the two papers of April 16th and 18th, one was an agreement to pay, and the other an assignment; I knew about the taking of the real-estate mortgage.

Redirect:

I stated to Mr. York my reason for not paying over the money to him; I said to him that I thought we had a prior claim and had a better right to this money; it was absolutely ours; this was on the 16th of May; it was the day that we got the draft that I told this to Mr. York.

Testimony of James E. Maclin read in evidence by Mr. Brown.

JAMES E. MACLIN being duly sworn on behalf of defendant-, testifies:

I am regimental quartermaster of the 11th regiment located at Sacket's Harbor; as such I had charge of the work that Witherby & Gaffney were contractors for; I was the disbursing officer through whom they received their pay.

Q. At what date, by the terms of the contract, was their contract to be finished?

A. They were entitled to the money as soon as the buildings were turned over; they turned them over, I think, on the 12th of May; I deducted the penalty at the rate of ten dollars per day for eleven days for not fulfilling the contract; that has never been paid to Witherby & Gaffney; it has been sent to the Treasurer; I accepted the work on the 12th of May.

Defendants rest.

A. E. YORK, plaintiff, recalled, examined by Mr. Purcell:

I heard Mr. Streeter testify in relation to having a conversation with me about their claim to this money, which was after
36 the time that we loaned them our written assignment; he did not say that his claim was prior to us, and that they were absolutely entitled to the money; the first talk that I ever had with him upon the subject was at Sacket's Harbor; we talked about it the next morning in Mr. Conde's store.

Cross-examination:

I don't think that they ever claimed that they were entitled to the money as against us; they refused to give us the money; I had several talks with them on the 15th of May; I saw them on the 16th at Mr. Conde's store; I don't think I had but two conversations with them on the 16th; I had a conversation with them before banking hours on the morning of the 16th; that was the conversation in which I gave them our assignment; I came back and got the assignment later; think about an hour afterwards.

Redirect:

They didn't state to me at any time by what claim or title they claimed this money; simply refused to give it to me.

WILLIAM W. CONDE, recalled by defendants, testified:

Our security by mortgage and what we got from the draft were not sufficient to pay our liabilities incurred by Mr. Gaffney.

The COURT: I have not allowed that evidence with any such view. They have not shown even what the mortgage was; simply that they were getting other security.

Mr. PURCELL: I do not object to their showing what his security was.

The COURT: Very well then, let him answer the question.

Mr. BROWN: Under your honor's statement I won't undertake to prove it; I prefer to leave it as — is, as I objected to the introduction of the original evidence.

37 Mr. PURCELL: You leave in what you put in?

Mr. BROWN: No, I will withdraw that; withdraw it entirely.

Mr. PURCELL: All right.

GENTLEMEN OF THE JURY:

The facts in this case, which it is necessary that you should consider, are in a very small compass; and although the litigation is an important one to both of these parties, the issue which you are to determine is one that you should readily comprehend, and be able to enter upon the discharge of your duty in this case with a clear conception of what that duty is.

It would appear that some time in the summer of 1889, Witherby & Gaffney, a firm of contractors residing in this city, entered into a contract with the Government of the United States to erect certain buildings at Sacket's Harbor. They were to do the work and furnish the materials necessary for the completion or carrying out of that contract. They were to receive in pay, for such work done and materials furnished, about the sum of $18,000. And it would appear, I think it is conceded, that by the terms of the contract entered into between Witherby & Gaffney and the United States Government, the United States Government was to retain 20 per cent. of the contract price until the contract was completed. That was for the security and protection of the Government. Therefore this 20 per cent. was not due, and could not be received by the contractors or any assignees of theirs, until the completion of the contract.

It appears that in the course of the construction of this building at Sacket's Harbor, Witherby & Gaffney applied to the plaintiffs in this case, York & Starkweather, for material with which to construct the buildings. They were copartners, doing business in the city of Watertown, and engaged in furnishing lumber. After they had

furnished some amount of lumber, the particular amount I
38 do not remember, and it is not very material, the plaintiffs desired to be secured for that which they had furnished—it then amounted I think to something like $3,000—and such conversation was had, or such agreement was made, by which the contractors, Witherby & Gaffney were willing to, and as a matter of fact did assign to the plaintiffs in this case, by an instrument in writing, dated the 27th of March, 1890, and which has been read to you, the sum of three thousand dollars which should become due upon the completion or in the course of the construction of this work at Sacket's Harbor. The assignment has been read, and the important part is the last, which is as follows:

"Now, therefore, of the monies due and to become due us from the said Government, we do hereby, for value received, assign and transfer to said York & Starkweather"—who are the plaintiffs here—"the sum of $3,000, and do hereby authorize, empower and request and direct Lieutenant J. E. Maclin, through whom payments are made for such construction, to pay said York & Starkweather on our account for such construction, the full sum of $3,000."

There was $500 paid upon that assignment, leaving a balance due to the plaintiffs under this assignment, providing the assignment is valid, in their favor of the sum of $2,500. That assignment, as I said, was executed on the 27th day of March, 1890, and delivered to the plaintiffs in this case; and if that was all there was of the transaction, so far as the law has up to this time been settled, the plaintiffs in this case would be entitled to recover the sum of $2,500 under this assignment made the 27th day of March, 1890, against the defendants in this case. But it also appaars that the defendants, one or both, I think both Mr. Conde and Mr. Streeter, when Witherby & Gaffney entered into the contract with the Government, became sureties upon their bond——

Mr. BROWN: One became surety.

The COURT: Mr. Conde became surety upon the bond of Witherby & Gaffney required to be executed by the Government; and that soon after the contractors commenced work upon this building at Sacket's Harbor, they commenced to get accommodations from the defendants in this case by their endorsement upon notes
39 of the contractors upon which they could raise money—and as is conceded here I think—they obtained this money for the purpose of enabling them to proceed and carry on the work upon this contract.

Now, it is claimed that some time after this endorsing of notes by the defendants in this case had commenced, the plaintiffs made some inquiries of the contractors as to their security, how they should be paid, and that finally, as a result of that conversation, some time prior to March 27th, 1890, the particular date is not disclosed, they made an agreement with these contractors, by which Mr. Gaffney, acting for himself and his partner, agreed that the final check that came to them upon the completion of their contract with the Government, should be turned over and delivered to the defend-

ants in this case. In other words, that by this verbal agreement, the last payment which was to be made, which included the 20 % that was being held back by the Government, and whatever else remained unpaid at the completion of the contract, by that agreement belonged to the defendants in this case; and that the contractors agreed to turn it over to them as soon as it was received by them from the Government officials.

And so the question for you to consider is whether this verbal agreement, or oral agreement as it is called, was made; whether there was such an agreement made prior to the 27th of March, 1890.

The other agreements or assignments that were made in writing on the 16th and 18th of April respectively, would not, as against the plaintiffs in this case, entitle the defendants to retain this money. So that they rely in this case, so far as the question is presented to you, upon the alleged oral or verbal agreement which they say was made prior to the 27th day of March, 1890.

So then that presents the square issue to you, whether this written assignment produced by the plaintiffs, Messrs. York & Starkweather, which was executed on the 27th day of March, 1890, is to prevail in this case; or whether the equitable assignment alleged in this case, and testified to by the two defendants, Mr. Conde and Mr. Streeter, alleged to have been made prior to this time, and I think some time in December or January previous, whether that shall prevail, and operate to transfer or make them, the defendants, entitled to receive and hold and retain this fund.

Now, gentlemen, in the consideration of that question, you have a right; as has been suggested by the able counsel representing the several parties here, to consider not only the sworn testimony in this case; but you have a right to consider all the circumstances surrounding the transaction. You have a right to ask yourselves whether it is probable, whether it is reasonable that if this alleged agreement was made in December or January, that it would have been reduced to writing; whether it is reasonable that they should have allowed it to remain simply as a verbal arrangement all that time. You have a right to consider whether or not, if they had this verbal understanding, which as both parties understood transferred legally this fund to the defendants, whether they then would have obtained the agreements or assignments of April 16th and 18th after that time. You have a right to take into consideration what the defendants said as to their knowledge bearing upon a legal assignment, to ascertain whether or not the parties, the minds of the parties met; whether there was a mutual agreement; whether the defendants understood at that time that they were to have the check,—from what was said, I do not mean what they supposed,—but from the conversation that there took place, whether the defendants understood that they were to have this check, the check to pay for the final estimate from the Government, when it should be received.

Now I do not know how I can aid you any further. That is the simple, distinct issue in this case, and you are the ones who must settle it, must ascertain whether or not there was an agreement

made between Witherby & Gaffney and the defendants in this case, prior to March 27th, 1890, by which the contractors agreed that this check which should be received upon the final completion of this contract, should be turned over by them to the defendants in this case. If that agreement was made prior to March 27th, 1890, that is an agreement that the check should be turned over, prior to March 27, 1890, then their assignment, their equitable assignment, makes their title to this fund superior to the title which the
41 plaintiffs would otherwise acquire under their written assignment, dated March 27, 1890.

But, gentlemen, if no verbal assignment, no verbal agreement, was made, then the plaintiffs are entitled to a verdict at your hands for the sum of $2,500 with interest. The amount of interest they will agree about.

You have a right, as I said before, to consider all the circumstances. The counsel for the respective parties have ably presented their views to you; they have called your attention to what they believe to be the important circumstances which throw light upon this transaction, and it is un-ecessary for me to go over it again. I want to say one thing, however, and that is that with the result of your verdict you have nothing to do; that is none of your business, how your verdict affects the defendants, or how it affects the plaintiffs. You are only here for the purpose of expressing by your verdict, your honest convictions of where the truth in this matter is. How it affects the defendants, how it affects the plaintiffs, is none of your concern.

And I have often thought, as I have sometimes said, that the better way for a jury to do, is to regard the parties on the one side or the other, simply as John Doe and Richard Doe, and take the evidence, and all the facts and circumstances in the case, and make up their minds where the truth of the matter is.

You have a right to consider, if you believe that to be the fact, that these defendants did not, when their attention was first called to this matter by the plaintiffs, say to them, "We have a verbal assignment." You have a right to consider whether, at that time, from the evidence, if there is any evidence bearing upon that question, whether they knew about a verbal or oral assignment of a fund of this character, or of an equitable assignment. You have a right to take, as I said, all those things into consideration, simply as an aid to you in determining the main question, and the only question; and that is, was this alleged agreement, alleged to have been made on the part of the defendants, actually made, prior to the 27th day of March, 1890.

42 Your attention has been called by both counsel to the fact that Mr. Gaffney has not been called. You will give that such importance as you think it is entitled to; you may consider it for or against either of the parties. You may consider, in that connection, that Mr. Gaffney had his agreement, his transactions with the defendants, that they received the money from him at the time, and you are to find,—if you come to the consideration of that and deem it important,—and it is for you to say whether it is or not,—whether it would be reasonable for the plaintiffs to call him, or

whether it would be more reasonable for the defendants to call him; and if there is any importance to be attached to it one way or the other, who it should militate in favor of or against.

That is all I think I ought to say; all I can say; I think of nothing else that will aid you. I only desire to add that this action has troubled the courts and the juries of this county for some time, and we want it now to be decided in the best possible fashion; get at the truth of it; give it your best consideration. Take it as business men, look at these assignments, these various instruments, remember carefully what each witness has said, all of the circumstances in the case: and then, as intelligent business men, men of experience—not as lawyers,—that is not necessary, because this is a matter of practical common sense; but let your best judgment work at it for a little while, and I am sure you will reach a proper conclusion in the matter, and a conclusion that if the court has done its duty, these parties will, or must be satisfied with. Take the case, gentlemen of the jury, and consider it as best you can.

Judge PURCELL: I ask your honor to charge the jury that if Gaffney simply promised to pay the notes that Streeter & Conde had endorsed for him, out of this fund, that it did not amount to an equitable assignment.

The COURT: I so state. I supposed I did state that in substance.

Judge PURCELL: I ask your honor to charge that in order to constitute an equitable assignment of the fund in question by the language of Gaffney, that there must have been at the time that he expressed the language a present purpose to pass an interest
43 in the fund to be created, and one that was accepted by the defendants.

The COURT: What I have charged is, and what I repeat is, that the minds of the parties must have met, the same as in making any other contract. There must have been an intention that the check, when it was received, should be delivered by Gaffney to the defendants in the case.

Judge PURCELL: That there was a then present purpose to that effect.

The COURT: I so charge.

Judge PURCELL: Made by him, and concurred in by the defendants.

The COURT: I so charge; I think I did charge that.

Judge PURCELL: I did not quite understand. For the purpose of the record, I desire to except to so much of the charge as stated that in any event, upon the evidence in this case, there was an oral assignment of this check or fund from Witherby and Gaffney to the defendants.

The COURT: What was that?

Judge PURCELL: For the purposes of the record I ask your honor to charge that there is no evidence in the case whatever that constitutes an equitable assignment of the fund from Witherby & Gaffney to the defendants.

The COURT: Oh, yes; I refuse that.

Exception.

Mr. BROWN: I would like to have your honor charge the jury that the fact that the demand of York & Starkweather against Witherby & Gaffney was for materials furnished in the erection of officers' quarters at Sacket's Harbor adds nothing to their equity as against the defendants, the fact that their lumber went into the contract adds nothing to their equity.

44 The COURT: I do not think that affects this question, as a matter of law.

Judge PURCELL: I desire to except to that.

The COURT: I mean to say that the fact that the lumber which was obtained from York & Starkweather, the plaintiffs, went into the building, has no materiality, no bearing upon the issue to be determined by you. The simple issue is whether the alleged verbal assignment, equitable assignment, was really made, and if it was, whether it was made prior to this written assignment executed by Witherby & Gaffney.

Judge PURCELL: Give me an exception to that.

Mr. BROWN: I have had some doubt whether the jury would appreciate the term "equitable assignment," and I would like to have it elucidated to the jury. I have no doubt that the counsel and court concur upon the subject, that the words "assignment" are unnecessarry, and that simply an agreement to deliver the check in the future for a certain purpose, was an equitable assignment.

Judge PURCELL: That is your statement of it. The question has been, I think, charged by the court.

The COURT: I think I won't charge further than I have upon the subject. Whatever the definition of verbal assignment is in the abstract, I have endeavored to tell the jury what it amounted to in this case.

Mr. BROWN: I think perhaps I can put my request in form to raise the question; that is that an agreement to deliver the check or draft when it came from the Government to Conde and Streeter, without any other words of assignment, would operate to entitle Conde and Streeter to the same.

The COURT: That is substantially what I have charged.

Judge PURCELL: That standing as a bare proposition, I except to.

The COURT: Let us understand each other.

45 Mr. BROWN: I will read it again; that an agreement to deliver the check or draft when it came from the Government to Conde and Streeter, without any other words of assignment, would operate to entitle Conde and Streeter to the same.

The COURT: That would have to be modified a little; there would have to be an agreement, based upon a consideration, and an agreement in which the minds of the parties met, present at that time, present intention; and if the agreement was that for the purpose,—so far as applies to this case—that for the purpose of paying these notes, that when the check was received they would give it to the defendants in this case, that constitutes an equitable assignment, and would entitle the defendants to recover, if that is found to be true.

Mr. BROWN: And I would like to have your honor charge the

jury that, if such an agreement was made in consideration of the endorsements, that the understanding of Conde and Streeter as to whether the agreement could be enforced legally is unimportant.

The COURT: Only as bearing upon whether it was made or not.

Mr. BROWN: The request assumes that it was made. I say that if there was such an agreement, that then the understanding of the parties, Conde and Streeter, as to whether the agreement could be enforced legally, is unimportant.

The COURT: Assuming that the agreement was made, that is true. But there should be added to the proposition, that they may consider whether or not they would enter into an agreement that they knew to be valid, if they did so know it.

Mr. BROWN: They did not know anything about it, according to the evidence.

The COURT: If you state that in your proposition then I charge it without any qualification.

Mr. BROWN: All right, that is what I put in. And I would like also to ask your honor to charge the jury that such an agreement to deliver the check or draft would amount to an assign-
46 ment; although not in writing, a valid enforceable agreement, although not in writing.

The COURT: That is right.

Judge PURCELL: In that connection I ask your honor to charge the jury that in determining wheth- the agreement to assign the check was actually made they may take into consideration the fact that Conde knew nothing about an oral assignment, oral equitable assignment, at the time, as testified to by him.

The COURT: I think I have charged that; I will not charge further upon that subject.

Mr. PURCELL: It is agreed that the interest is $421.25.

The COURT: So that, gentlemen of the jury, you will find either of these verdicts, either for the plaintiff in the sum of $2,921.25; or else you find for the defendants.

The foregoing is all the evidence and proceedings had or taken upon the trial of this action.

BROWN & ADAMS AND
WATSON M. ROGERS,
Defendants' Attorneys.

The foregoing case and exceptions are hereby settled as above, and ordered filed in Jefferson county clerk's office, and annexed to the judgment-roll.

P. B. McLENNEN,
Justice Supreme Court.

In Supreme Court.

ANSON E. YORK and WALLACE W. STARKWEATHER *against* WILLIAM W. CONDE and JOHN C. STREETER. } Statement under Rule 41.

Summons and complaint served on Conde July 26, 1890.
47 Summons served on Streeter, July 29, 1890.
Complaint served on Streeter, Aug. 7, 1890.
Answer of defendant Conde served Sept. 12, 1890.
Answer of defendant Streeter served Oct. 4, 1890.

JEFFERSON COUNTY, *ss.*:

C. L. Adams being duly sworn, says he is one of defendants' attorneys in this action, that there has been no change in parties since the commencement thereof, and that no opinion in writing was given in this action by the justice before whom the same was tried.

C. L. ADAMS.

Sworn before me this 21st day of August, 1893.

J. NELLIS,
Notary Public.

At a general term of the supreme court, held at the court-house in the city of Utica, Oneida county, in and for the fourth judicial department of the State of New York, commencing on the 12th day of September, 1893.

Present: Hon. George A. Hardin, presiding justice; Hon. Celora E. Martin, Hon. Milton H. Merwin, associate justices.

ANSON E. YORK and Another, Respondents, *against* WILLIAM W. CONDE and Another, Appellants.

Judgment and order affirmed with costs.

A copy decision.

H. O. FARLEY,
Sp'l Dep. Clerk.

48 At a general term of the supreme court, held at the court-house, in the city of Utica, Oneida county, in and for the fourth judicial department of the State of New York, commencing on the 12th day of September, 1893.

Present: Hon. George A. Hardin, presiding justice; Hon. Celora E. Martin, Hon. Milton H. Merwin, associate justices.

ANSON E. YORK *et al.*, Respondents, *against* WILLIAM W. CONDE and JOHN C. STREETER, Appellants. } Order of Affirmance.

This cause having been brought on for argument at a general term of this court, held in and for the fourth judicial department,

at the court-house in the city of Utica, on the 12th day of September, 1893; after hearing Elon R. Brown, of counsel for the appellants, and Henry Purcell, of counsel for the respondents, and due deliberation having been had thereon,

It is hereby ordered, that the judgment in this action, entered in Jefferson county clerk's office on the 22d day of March, 1893, for $3,370.64 damages and costs, in favor of said plaintiffs and respondents and against the said defendants and appellants, be and the same hereby is in all things affirmed with costs.

A copy of order.

H. O. FARLEY,
Sp'l Dep. Clerk.

Entered.
H. O. FARLEY,
Sp'l Dep. Clerk.

49 Supreme Court.

ANSON E. YORK *et al.*, Respondents,
against
WILLIAM W. CONDE and JOHN C. STREETER, Appellants.

Judgment of Affirmance.
Entered Sept. 30, 1893, at 10.15 a. m.

The appeal taken by the above-named defendants from the judgment entered in this action on the 22d day of March, 1893, in the clerk's office of Jefferson county, in favor of the above-named plaintiffs and against the said defendants, for the sum of three thousand, three hundred and seventy dollars and sixty-four cents ($3,370.64) damages and costs, and from the order herein denying the defendants' motion for a new trial upon the minutes of the trial court, having been brought to a hearing, and heard at the general term of the supreme court, in and for the fourth judicial department of the State of New York, held at the court-house in the city of Utica, N. Y., commencing on the 12th day of September, 1893, and the court, after due deliberation, having made and filed its decision, whereby it affirmed said judgment and order appealed from, with costs; and the plaintiffs' costs and disbursements having been taxed at the sum of $78.75 it is now on motion of Henry Purcell, attorney for the plaintiffs,

Ordered and adjudged, that said judgment and order, so appealed from be, and the same hereby are in all things affirmed; and that the said plaintiffs herein, Anson E. York and Wallace W. Starkweather, recover of the defendants, William W. Conde and John C. Streeter, the said sum of $78.75, their costs and disbursements as taxed, and that plaintiffs have execution therefor.

GEO. H. COBB,
Deputy Clerk.

50 In Supreme Court.

ANSON E. YORK and WILLIAM W. STARKWEATHER, Respondents,
vs.
WILLIAM W. CONDE and JOHN C. STREETER, Appellants.

SIRS: Please take notice that the defendants, William W. Conde and John C. Streeter, hereby appeal to the court of appeals from the judgment and order of the general term of the supreme court entered herein in Jefferson county clerk's office on the 30th day of September, 1893, affirming the judgment entered at circuit in this action in favor of the plaintiffs and against the defendants, for $3,370.64, damages and costs, in Jefferson county clerk's office March 22nd, 1893, and also affirming the order of the circuit denying a new trial entered at the same time in said clerk's office.

Dated Nov. 16th, 1893.

Yours, &c.,

BROWN & ADAMS AND
WATSON M. ROGERS,
Appellants' Attorneys.

To the clerk of Jefferson county and Henry Purcell, Esq.

In Supreme Court.

ANSON E. YORK and Ano.
vs.
WILLIAM W. CONDE and Ano.

STATE OF NEW YORK,
Jefferson County Clerk's Office.

51 I, Frank D. Pierce, clerk of the county of Jefferson, and clerk of the supreme court and county court, which are courts of record in and for said county, do hereby certify that I have compared the notice of appeal to the court of appeals, decision of the general term, judgment of affirmance, and judgment-roll with the originals now on file in this office, and that the same are true and correct transcripts thereof, and of the whole of said originals.

Witness, my hand and seal of office at Watertown, N. Y., this 29th day of December, 1893.

FRANK D. PIERCE, *Clerk.*

In Supreme Court.

ANSON E. YORK and Ano.
vs.
WILLIAM W. CONDE and Ano.

JEFFERSON COUNTY, *ss:*

Elon R. Brown, being duly sworn, says that he is one of the attorneys for the appellants in the above-entitled action, that deponent is informed and verily believes that no opinion was written by the

court at general term or by any member thereof on the affirmance of the judgment in this action by said court.

ELON R. BROWN.

Subscribed and sworn before me this 18th day of December, 1893.

J. NELLIS,
Notary Public.

52 In Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER, Plaintiffs,
against
WILLIAM W. CONDE and JOHN C. STREETER, Defendants.

MARTIN, *J.*:

The controversy between the parties to this action was as to the priority of their respective rights to the fund in question.

The plaintiffs' claimed title was founded on an assignment to them made by Witherby & Gaffney, March 27, 1890. The defendants' rights were based upon an oral agreement with Witherby & Gaffney, made long before the plaintiffs' assignment, which the defendants contend amounted to an equitable assignment to them of the fund in question.

If the defendants' contention is sustained by the proof, or if the evidence was sufficient to present a question of fact for the jury upon that question, the judgment must be reversed, and no other question need be considered.

The defendants' testimony was to the effect that in or about the month of September, 1889, the firm of Witherby & Gaffney applied to the defendants to endorse the notes of that firm to enable it to procure the money necessary to prosecute the work under its contract with the United States Government; that the defendants agreed to, and did, endorse such notes; that in consideration of such agreement and endorsement by the defendants, said firm expressly agreed that the defendants should have the avails of such contract when it was closed up, with which to pay the notes which should be endorsed by them, and that when the check or draft for the work should be received by said firm, it should be delivered to the defendants to be applied by them in paying such notes.

53 If this agreement was made as testified to, we think as it was founded upon a valuable consideration, it amounted to an equitable assignment of the fund in question, and that the defendants were entitled to receive and use it for the payment of the notes endorsed by them. That such an agreement amounts to an equitable assignment, seems to be well settled in this State. Williams *v.* Ingersoll, 89 N. Y., 508; Fairbanks *v.* Sargent, 104 *id.*, 108; S. C., 117 *id.*, 320. That the defendants subsequently took a written assignment does not affect such rights. The assignment was not invalid because it was oral. Riley *v.* Phœnix Bank of City of New

York, 83 N. Y., 318; Coates *v.* First National Bank of Emporia, 91 *id.*, 20.

We think the court erred in holding as a matter of law, that the defendants acquired no right to the fund in question under their agreement and directing a verdict for the plaintiffs, and that the defendants' exception thereto was well taken.

Judgment reversed on the exceptions and a new trial ordered with costs to abide the event.

Hardin, P. J., and Merwin, J., concurred.

Supreme Court, General Term, Fourth Department.

ANSON E. YORK and Another, Respondents, *against* WILLIAM W. CONDE and Another, Appellants. } Argued September, 1892. Decided November, 1892.

Hardin, P. J.; Martin and Merwin, JJ.

Appeal from a judgment entered in Jefferson county, December 24, 1891, upon a verdict at the Jefferson circuit in favor of
54 the plaintiffs for $2.737.50; also from an order denying a motion on the minutes for a new trial.

Brown & Adams for app'l't Conde.
Watson M. Rogers for app'l't Streeter.
Henry Purcell for respondents.

MERWIN, *J.:*

In the fall of 1889 the firm of Witherby & Gaffney entered into a contract with the United States Government for the construction of certain buildings at Madison barracks at Sacket's Harbor, and thereafter they purchased of the plaintiffs materials for use in the erection of said buildings to such an extent that on the 27th of March, 1890, they were indebted to the plaintiffs thereon in the sum of $3.000. At that date they executed and delivered to plaintiffs an instrument in writing which, after reciting the indebtedness, and that there would be due and payable to them from the Government considerable sums of money before and on the completion of the work, proceeded as follows:

"Now, therefore, of the moneys due and to become due us from the said Government, we do hereby for value received assign and transfer to said York & Starkweather, the sum of three thousand dollars, and do hereby authorize, empower, request and direct Lieut. J. E. Macklin, R. Q. M., Eleventh infantry, U. S. A., through whom payments are made for such construction, to pay to said York & Starkweather on our account for such construction, the full sum of three thousand dollars, as follows: First, $500 from the next estimate and payment due or to become due us, and the sum of $2,500 on the completion of said work by us, and when the balance of our contract with the Government becomes due and payable to us."

On the 12th of May, 1890, Witherby & Gaffney completed the work, and on the 14th of May the agent of the Government de-

livered to them a draft for $4,428, that being the balance due. This was payable to their order and they upon the same day
55 endorsed and delivered it to the defendants, who upon the following day obtained the money thereon. The plaintiffs have received upon their debt $500. The balance of $2,500 and interest they seek to recover in this action. They claim that they were the owners of the proceeds of the draft to the extent of such balance, and that defendants when they received the draft had notice of their claim. The defendants concede that they had notice of plaintiffs' claim, but they insist that the instrument under which plaintiffs make their claim is void under § 3477 of the Revised Statutes of the United States, and also that prior to its date there was a verbal agreement between the defendants and Witherby & Gaffney by which the latter, in consideration that the defendants would endorse their paper and enable them to raise money to carry on the work, agreed that such paper should be paid from the moneys to become due on the contract, and that they would turn over to the defendants the check or draft which they should receive upon the final settlement, so that the defendants might be fully paid for what they endorsed for them or furnished them. Whether there was such an agreement was a question of fact for the jury to determine, under the ruling of this court upon a former appeal. See 61 Hun. 26.

Upon the trial under review it appeared that at the time the defendants received the draft they were liable as endorsers for Witherby & Gaffney to the amount of $4,900, of which $4,200 existed prior to March 27, 1890. Witherby & Gaffney were also indebted to the defendant Conde individually in the sum of $450, of which $205 was incurred after March 27, 1890, and they were also indebted to the defendant Streeter individually $350, and there is evidence that none of this accrued after March 27, 1890. These individual accounts were for moneys or supplies furnished to Witherby & Gaffney in connection with the work. It also appears that the defendants, in disposing of the proceeds of the draft, applied $3,200 in the payment of notes, $250 on the individual account of Conde, $350 on the individual account of Streeter, and the balance of $628 they returned to Witherby & Gaffney. The court held that the United States statutes did not apply, and charged that the plaintiffs were entitled as a matter of law to recover the sum of $1,183,
56 being the items of $628 and $350 above named and also $205 of the item $450. As to the balance of the plaintiffs' claim, its recovery, as the court charged, depended on whether the jury found an oral agreement, as claimed by defendants prior to plaintiffs' agreement. The verdict was for plaintiffs for the full amount, thus negativing the existence of any prior oral agreement with defendants.

By § 3477 of the U. S. Revised Statutes, it is provided that "all transfers and assignments made of any claim upon the United States, or of any part or share thereof or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for

receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

The defendants, in support of their contention that this statute applies here and strikes down the instrument upon which plaintiffs base their rights, rely mainly on the case of Spofford *vs.* Kirk, 97 U. S., 484. In that case Kirk employed Hosmer to prosecute for him a claim against the United States for supplies furnished to the army during the late war, and for damages sustained by reason of the military occupation of his property. Before the allowance of the claim he drew in favor of Wharton an order on Hosmer for a certain amount payable out of any moneys coming into his hands on account of the claim. Hosmer accepted the order and Spofford became its holder in good faith. An award was afterward made to Kirk and a warrant issued in his favor. The latter then refused to recognize the validity of the order or endorse the warrant in the hands of Hosmer. Spofford then filed a bill against Kirk and Hosmer to enforce compliance with the order. It was held that the accepted order was void and gave the holder no interest in the claim against the United States, and no lien upon the fund arising out of the claim, although in the absence of the statute there
57 would be an equitable assignment *pro tanto*. It was said that such an order was not only invalid when set up against the Government, but also as between the parties.

It is, however, claimed by the plaintiffs that subsequent adjudications in the same court have materially modified the rule laid down in the Spofford case. In Goodman *vs.* Niblack, 102 U. S., 556, it was held that the statute did not apply to a transfer by means of a general assignment for the benefit of creditors. It also seems to have been held that in case the Government recognized the validity of such an agreement, the parties to it or those claiming under them would be precluded from setting up that the contract was not assignable. And it was said of the Spofford case that it was a case of transfer or assignment of a part of a disputed claim, then in controversy and it was clearly within all the mischiefs designed to be remedied by the statute, and that a consideration of those mischiefs, as well as a careful examination of the statute, "leave no doubt that its sole purpose was to protect the Government and not the parties to the assignment." In Hobbs *v.* McLean, 117 U. S. 567, one Peck, having put in a bid for a contract which he expected to and did afterwards receive, made an agreement with other parties by which in consideration of moneys to be advanced and services performed by them, he agreed to divide with them a fund he expected to receive from the Government on the contract. This agreement was held not to be affected by the statute and was enforced against the fund in the hands of the assignee of the contractor, and it was said that the purpose of the statute "was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed." In Freedmen's Saving Co. *vs.*

Shepherd, 127 U. S., 494, it was held that the statute did not apply to assignment of a lease and the rents to become due thereunder from the Government, and, the Government having recognized the assignment and paid the rent to the assignee, it was held that the other parties could not complain and that the provisions made in the assignment for the application of the rents should be carried out.

In the light of these cases, the ruling of the court below on
58 this subject should not I think be disturbed. In the course of the trial it appeared that on the 26th of March, 1890, the defendants received from the wife of Gaffney as collateral security for their endorsements a mortgage upon two houses owned by her; that afterwards they foreclosed the mortgage and bid in the property, and had since then realized from the sale of one of the houses $800 which they had applied on the balance remaining of the $4,900 endorsements; that they still held the other house which was encumbered by a mortgage of $700, and was worth $1,500 to $1,600. The court in its charge having referred to the equitable doctrine that a party having a lien upon two funds will, upon the application of a party having a lien upon one of them, be compelled to exhaust his remedy on the other security in the first instance, the defendants' counsel asked the court to charge that that doctrine had nothing to do with this case. To this the court replied: "I can't say that; it is broad enough to engraft upon every case in order to do justice between the parties where the question arises." The defendants duly excepted. This exception was, I think, a good one. The jury were permitted to infer that the right of the defendants to receive the proceeds of the draft at the time they did receive them was diminished or affected by the fact that the defendants then held other security which had not since then been fully exhausted, or that defendants had no right to the proceeds of the draft until such exhaustion. This would naturally lead the jury away from the true question for them to decide which was whether the agreement with the defendants was prior to that with the plaintiffs. If it was, it was not affected or diminished by the fact that when the draft was received, the defendants had other security. The rights of the plaintiffs in respect to such security cannot be determined in this action. Nothing had been realized therefrom at the time the draft was paid.

The court charged that the plaintiffs in any event could recover the sum of $628 which the defendants after they received the proceeds of the draft paid back to Gaffney, and declined to charge that if the jury found that there was a prior equitable lien or assign-
59 ment in favor of defendants to the extent of the whole $4,400 in the check or draft, and it came rightfully to the hands of defendants, it was immaterial to plaintiffs what use it was put to. This should have been charged. For if the defendants had a lien to the full amount, they were entitled to receive the whole and that would necessarily exclude the right of plaintiffs to recover any part of it in this action. Whether the defendants, after they gave back a portion of the fund, could still hold for the same

amount other security which they may have had, is a question that does not here arise. Upon that question the plaintiffs have a full remedy elsewhere.

The court also charged that the plaintiffs were in any event entitled to $205 of the amount allowed upon the individual debt to Conde. The full amount of his debt was $450. Of this, $205 was incurred after the date of the agreement with plaintiffs. The $250 was applied generally upon the account. There was evidence tending to show that the agreement between defendants and Witherby & Gaffney covered the individual account of Conde as well as the endorsements. If so, I fail to see how as matter of law it should be said that plaintiffs could recover the $205. Exception was duly taken to the charge and refusal to charge above referred to.

The plaintiff York being upon the stand as a witness in his own behalf was allowed to testify what he told the defendant Conde that he would take rather than have any suit about it, in other words his offer of compromise. Objection and exception were duly taken. This was immaterial, and in a close case might have an improper effect upon a jury.

It follows that there should be a new trial.

Hardin, P. J., and Martin, J., concur.

Judgment of order reversed upon the exceptions and new trial ordered, costs to abide the event.

60 At a special term of the supreme court held at the court-house in the city of Watertown, N. Y., on the 30th day of November, 1895.

Present: Hon. P. C. Williams, justice presiding.

Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER
ag'st
WILLIAM W. CONDE and JOHN C. STREETER.

This cause having been brought on upon the remittitur herein sent down from the court of appeals and now filed in this court, by which remittitur it appears that an appeal was taken by the defendants from a judgment of this court to the said court of appeals, and that such judgment on the said appeal has been affirmed by the said court of appeals, with costs, and that the record and proceedings had been directed by said court of appeals to be remitted to this court, and this court directed to enforce the said judgment of the court of appeals according to law: Now, on reading and filing the said remittitur and on motion of Henry Purcell, attorney for the plaintiffs—

It is ordered and adjudged that the said judgment of the said court of appeals be, and the same hereby is, made the judgment of this court, and that the plaintiffs have execution against the defendants for the said costs of appeal when adjusted by the clerk of this

court and inserted herein, as well as for the amount adjudged
61 to be recovered in and by the judgment of this court in this cause entered in the clerk's office of Jefferson county on March 22nd, 1893, and that this order be annexed to the judgment-roll.

Enter.

WILLIAMS, *J.*

Entered Nov. 30, 1895, 11.55 a. m.

F. D. PIERCE, *Clerk.*

62 Supreme Court, Jefferson County.

ANSON E. YORK and WALLACE W. STARKWEATHER *ag'st* WILLIAM W. CONDE and JOHN C. STREETER.	Judgment, Nov. 30, 1895, 11.55 a. m.

A judgment in this action in favor of the above-named plaintiffs against the above-named defendants having been rendered in this court on March 22nd, 1893, upon the verdict of a jury, for thirty-three hundred seventy and $\frac{64}{100}$ dollars, damages and costs, which judgment was subsequently reduced on a retaxation of costs to the sum of thirty-two hundred ninety-five and $\frac{64}{100}$ dollars, and the defendants having appealed from said judgment to the general term of this court, fourth department, and the said judgment having been by said court in all things affirmed, and judgment of affirmance having been rendered thereon and entered in the clerk's office of said county on September 30th, 1893, affirming said judgment and for seventy-eight and $\frac{75}{100}$ dollars, costs, and the defendants having thereupon appealed to the court of appeals, and the said court of appeals having since sent hither its remittitur filed herein the 30th day of November, 1895, by which it appears that the said court of appeals has affirmed the said judgment in all things, with costs, and has given judgment accordingly, and has remitted the judgment of the said court of appeals to this court, to be enforced according to law, and this court having by an order entered
63 herein the 30th day of November, 1895, ordered that said judgment be made the judgment of this court, with costs, and the same having been adjusted by the clerk of this court at the sum of $117.72, it is now, on motion of Henry Purcell, the attorney for the plaintiffs—

Ordered and adjudged that the judgment of the said court of appeals be, and the same is hereby, made the judgment of this court, and that the plaintiffs recover of the defendants the said sum of $117.72, costs of said appeal to the court of appeals, and that they have execution therefor, as well as for the amount adjudged to be recovered by the said plaintiffs in and by the judgment of this court entered in this cause on said March 22nd, 1893, less the said sum of seventy-five dollars, by which said judgment was reduced on the retaxation of costs therein, as above mentioned.

F. D. PIERCE, *Clerk.*

64 Court of Appeals.

ANSON E. YORK *et al.*, Respondents,
vs.
WILLIAM W. CONDE *et al.*, Appellants.

Appeal from judgment of the general term of the supreme court in the fourth judicial department entered upon an order made September 12, 1893, which affirmed a judgment in favor of plaintiffs entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Elon R. Brown, for appellants; Henry Purcell, for respondents.

ANDREWS, *Ch. J.:*

The determination of this appeal depends upon the true construction of section 3477 of the Revised Statutes of the United States. The general facts may be briefly stated. The firm of Witherby & Gaffney were contractors with the United States for building barracks at Sacket's Harbor. The plaintiffs constituted the firm of York & Starkweather and furnished to the contractors lumber and materials for the work of the value of $3,000 and upwards, which were used in the construction. During the progress of the work and before its completion, and on the 27th day of March, 1890, Witherby & Gaffney made a written assignment to York & Starkweather of $3,000 "of the money due and to become due" to the assignors from the Government on their contract to apply on their indebtedness to the assignees for the lumber and ma-
65 terials so furnished, and authorized the disbursing agent of the Government, through whom the payments on the contract were made, to pay the plaintiffs $500 from the next estimate thereafter and $2,500 on the completion of the contract, and when the balance coming to the assignors should become payable to them. Witherby & Gaffney paid the plaintiffs $500, but no further payment has been made to them. On May 15, 1890, the contract having been completed, the disbursing officer delivered to Gaffney, one of the contractors, a draft for $4,400 in payment of the amount unpaid on the contract, which he delivered on the same day to the defendants to secure them for liabilities, as indorsers and otherwise, previously incurred for the benefit of Witherby & Gaffney. The defendants, before they had parted with the draft, were notified by the plaintiffs of their claim and of the terms of the assignment to them, and they demanded that the defendants should pay them out of said draft the sum of $2,500, the amount remaining unpaid to them from Witherby & Gaffney, which the defendants refused to do. This action was thereupon brought to recover said sum.

The claim set up by the defendants in their answer that prior to the assignment to the plaintiffs Witherby & Gaffney had verbally assigned to them the money to become due on the contract as security for their indorsements was tried before the jury and found

against them and need not be further considered. There can be no doubt that under the general rule of law prevailing in this State the plaintiffs, under the assignment of March 27, 1890, acquired an equitable, if not a legal, title to the money payable on the contract of Witherby & Gaffney with the Government to the extent of $3,000, and that the defendants, having acquired possession of the draft for the final payment on the contract by delivery from
66 Witherby & Gaffney to secure an antecedent liability, on being notified of the claim of the plaintiffs, held the draft and the fund it represented, as trustee of the plaintiffs, to the extent of their claim. (Field *v.* Mayor, &c., 6 N. Y., 179; Devlin *v.* Mayor, &c., 63 *id.*, 8.)

But the contention is that the plaintiffs took nothing under the assignment to them because, as is claimed, the transaction was void under section 3477 of the Revised Statutes of the United States, to which reference has been made. That section is as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

This section has been considered in several cases by the Supreme Court of the United States. If that court has construed the section so as to determine the point involved in this case we should
67 deem it our duty to follow its decision. The judgment we shall render will not, we suppose, be subject to review by the Supreme Court. We do not question the validity of the section in question nor will our decision affect any right of the defendants based thereon. Their right, if any, rests upon the transfer of the draft after it came to the hands of Witherby & Gaffney. They seek to defeat the right of the plaintiffs under their prior assignment of a portion of the fund and invoke section 3477 to establish that the assignment was void and conferred no right; but on a question of statutory construction of an act of Congress which has been determined by the Supreme Court of the United States, subsequently arising in this court, we should feel bound to adopt and follow the construction of that tribunal on the principle of comity, although in a case where the ultimate jurisdiction is vested in this court. This principle is especially important to be observed in such a case in view of the relation between the Federal and State courts, not exercising in all cases

a co-ordinate jurisdiction, but engaged in the administration of justice to a great extent between persons who are citizens both of a State and of the United States. The decisions of the tribunals of a State as to the true construction of the statutes of its own sovereignty are followed by the Federal courts, and it would be most unseemly and produce great confusion if State courts should refuse to adopt the construction of the Supreme Court of the United States of Federal statutes.

The section in question was taken from the act of Congress approved February 26, 1863, entitled "An act to prevent frauds on the Treasury of the United States." Its object was to protect the Government. It was enacted, as was said by Mr. Justice Miller in Goodman *v.* Niblack (102 U. S., 556), to prevent embarrass-
68 ments to the Government which might arise if it was compelled to recognize rights of third persons not parties to the original contract or transaction, and, second, to shut the door to improper influences in prosecuting claims before the departments or courts or Congress.

There are two theories of construction of the statute. One is that which gives the widest meaning to the words and which makes a transfer or assignment of a claim or interest void not only as to the Government and its officers, but as to the parties to the transfer or assignment. Upon this theory the money, when paid over to the original claimant, cannot be reached in his hands unless, after the allowance of the claim and the issuing of a warrant for its payment, the provisions of the section were complied with. This theory wholly forbids the acquisition before this has been done of any right in the fund through any transfer or assignment, however formal the instrument or however just and innocent the transaction. The other theory is that the objects of the statute are accomplished by a construction which makes an assignment or transfer made before the allowance of a claim void as between the claimant and the Government, but leaves the transferee, after the fund has come to the hands of the claimant, to assert such legal rights against the fund and avail himself of such legal remedies to enforce them as exist in other cases of transfer.

The Supreme Court has consistently maintained that a transfer or assignment made before the allowance of a claim was void at the election of the Government, and that as against the assignee or transferee the Government may wholly disregard it, and that payment made to the original claimant by the Government is a good acquittance of the liability, although it had notice of the transfer at the time; but the court has also decided that the
69 Government may recognize such a transfer, and that payment to the transferee will protect it against any subsequent claim of the original party (Bailey *v.* U. S., 109 U. S., 432). The principal case relied upon by the defendants to sustain their contention is Spofford *v.* Kirk (97 U. S., 484), and if what Mr. Justice Miller, in Goodman *v.* Niblack (*supra*), characterizes as the strong language of the opinion in that case is to have the broadest application there would be difficulty in holding that the assignment now in question

can be upheld; but the transfer under consideration in Spofford *v.* Kirk was of part of a disputed claim then in controversy between the claimant and the Government. The court soon began to depart from the rigid interpretation of the statute indicated in Spofford *v.* Kirk. In Goodman *v.* Niblack (*supra*) it was held that the statute did not embrace the case of a voluntary general assignment by an insolvent for the benefit of his creditors, and that a claim existing against the Government in favor of the assignor passed by the assignment. Mr. Justice Miller, in his opinion, referring to the statute, said: "Its sole purpose was the protection of the Government and not that of the parties to the assignment." The case of Hobbs *v.* McLean (117 U. S., 567) shows a further relaxation of the strict rule declared in Spofford *v.* Kirk, and the court, referring to sections 3737 and 3477 of the Revised Statutes, after stating that they were passed for the protection of the Government, said: "The purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed." The case of Freedman's Savings and Trust Co. *v.* Shepherd and Shepherd *v.* Thompson (127 U. S., 494) has an important bearing upon the present case. The facts are complicated.

70 The question related to the conflicting claims of parties to two drafts which had been issued and delivered by the Government to an attorney for rent under a lease of premises made by one Bradley to the Government in 1873, and to another sum of $787.50 paid by the Government to a receiver for rent of the same premises after June 6, 1878. One of the drafts was for rent for the year ending June 30, 1876, and the other for the rent for two years prior to June 30, 1878. Thompson, one of the parties to the action, claimed to be entitled to the drafts as pledgee of the rents under an agreement dated June 21, 1877, made between him and Bradley, the original lessor, and Shepherd, his grantee. At the date of the pledge a suit was pending against the United States to recover the rent for the year ending June 30, 1876, in favor of Bradley. The case was finally decided in his favor in October, 1878. During the pendency of the suit a suit was brought for the rent for the two years ending June 30, 1878, and the second draft was given in settlement of that suit. Enough has been stated to show that Thompson claimed under a pledge made, not only before an allowance of the rent due June 30, 1876, but while a suit against the United States was pending for its recovery, and that only part of the rents for the years 1877 and 1878, included in the pledge, for which the second draft was given, had become due when the pledge was made. Thompson's right to the drafts was contested under section 3477 of the Revised Statutes, the claim being that the pledge was void. But this objection was overruled and the court sustained Thompson's claim to the drafts, and on appeal the judgment was affirmed. Mr. Justice Harlan, in pronouncing the opinion of the court, said: "The simple question is whether the money received from the Government shall be diverted from the purpose to which Bradley,

71 Shepherd, and Shepherd's trustees agreed in writing that it should be devoted, namely, the payment of the debts Thomp-

son holds against Shepherd. This question must be answered in the negative, and in so adjudging we do not contravene the letter or spirit of the statute." The case, although many more circumstances appear than are here stated, seems to us to go far in sustaining the claim of the plaintiffs in the present action. We think that the question cannot be said to have been decided adversely to their contention in the Federal Supreme Court. In our opinion a just construction of the statute does not invalidate the transfer of Witherby & Gaffney to the plaintiffs, nor will the objects of the statute be defeated by the construction that such a transfer, made in the legitimate and usual course of business, in good faith, to secure an honest debt, while it may be disregarded by the Government, is good as between the parties so far as to enable the transferee, after the Government has paid over the money to the claimant, to enforce as against him or those who take with notice the interest or lien given by the assignment. The fact that the Government may refuse to recognize any transfer or assignment, in connection with the general principle of law, which avoids all agreements contrary to public policy, will be a sufficient discouragement to illegitimate transactions, or, at all events, it is all the law can justly interpose, having due regard to the exigencies of business and the protection of innocent parties.

The supreme court of Massachusetts, in Jernegan *v.* Osborne (155 Mass., 207), reached substantially the same conclusion as that to which we have arrived.

The judgment should be affirmed.

All concur except O'Brien, J., not sitting.

Judgment affirmed.

Endorsed on cover: Case No. 16,216. New York supreme court. Term No., 143. William W. Conde and John C. Streeter, plaintiffs in error, *vs.* Anson E. York & Wallace W. Starkweather. Filed March 11, 1896.